No. 14668

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-15-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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ficiary under said insurance policy. Said policy was in the sum of $10,000.00. That said Ethel Grace Short died on June 14th, 1951. That plaintiff became and is the duly appointed, qualified and acting Administratrix of the estate of Ethel Grace Short, deceased, which said estate is in administration in Alameda County, California. That said Ethel Grace Short became entitled to certain payments accruing on said policy prior to her death and said sums have not been paid.

2.

That the aforesaid policy was issued under what is known as the National Service Life Insurance Act of 1940. That by said insurance policy the life of said Irving Ritchie Short was insured in favor of his mother, the said Ethel Grace Short, in the sum of $10,000.00.

That on or about April 25, 1949, said Irving Ritchie Short changed said insurance policy by designating his said mother, Ethel Grace Short, as primary or principal beneficiary under said insurance policy, and his brother, defendant, James Harvey Short, and defendant, Berkshire Industrial Farm of Canaan, New York, as contingent beneficiaries under said policy. Said change in said policy provided, in effect, that said principal beneficiary should be paid $10,000.00 under said policy and that the payments to said contingent beneficiaries should —if they became payable—be in the sum of $5,000.00 each.

That plaintiff has, as yet, been unable to ascertain whether said Berkshire Industrial Farm had or has

capacity to receive gifts under National Service Life Insurance Policies.

Said James Harvey Short became and he is the duly appointed, qualified and acting administrator of the estate of said Irving Ritchie Short, deceased, and he claims the entire amount of said policy as such administrator and he claims that if said appointment of contingent beneficiaries took effect, their rights are subject to the claims of plaintiff.

3.

That a true copy of the aforesaid insurance policy is as follows:

The United States of America
Veterans' Administration
Washington, D. C.
National Service Life Insurance

Date Insurance Effective January 1, 1943.
Certificate No. N- 8 041 741.

This Certifies That Irving Ritchie Short has applied for insurance in the amount of $10,000, payable in case of death.

Subject to the payment of the premiums requires, this insurance is granted under the authority of The National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which together with the application for this in-

surance, and the terms and conditions published under authority of the Act, shall constitute the contract.

(Stamped):

FRANK T. HINES,
Administrator of Veterans' Affairs;

/s/ DONALD J. TURNER,
Registrar.

Countersigned at Washington, D. C., Feb. 15, 1943.

Mrs. Ethel Grace Short
1386 Euclid Avenue
Berkeley, California.

Insurance Form 360.

4a.

That the above-entitled District Court is a district court of the United States, in and for the district in which the plaintiff resides and that the place of residence of defendant, James Harvey Short, is the same as that of the plaintiff. Said two parties reside at the Presidio, California.

4b.

That Ethel Grace Short is at times herein referred to as Mrs. Short. That said Irving Ritchie Short is at times herein referred to as Irving Short.

5.

That the Veterans' Administration contends, and the defendant, United States of America, contends

that the Estate of said Ethel Grace Short has no right under said policy because the fact of said Irving Short's death was not determined until after the death of Ethel Grace Short, which latter death occurred on June 14th, 1951.

That the plaintiff contends: (a) That there was no reasonable ground for delaying the determination of the fact of death of said Irving Short until June 14th, 1951, the date of the death of Ethel Grace Short, and (b) that it was not the law that it was necessary that Mrs. Short should be alive in order to entitle her to payments under said policy.

Other contentions of plaintiff are hereinafter set out.

As regards the waste of time by the Veterans Administration in establishing the death of said Irving R. Short the plaintiff alleges:

That when the claim of Ethel Grace Short was filed upon said policy of insurance, the Veterans Administration took the position that it must first have a report from the War Department as to whether said Irving Ritchie Short was or was not in the military service at the time of his death and —although the War Department report required proof of death itself—the State Department must then make a separate report that Irving Ritchie Short was dead. It will appear that the Government did not permit Mrs. Short to prove said death in the usual way, and that it used as an excuse for postponing determining the fact of the said

death the aforesaid rules which had no application and which, as applied to this case, were unreasonable. It did not determine Irving Short died until June 14, 1951.

Plaintiff pleads certain facts which support the claim hereinbefore set forth.

6.

As stated, Irving Ritchie Short died in Tokio on August 30, 1952.

The War Department at once knew of the death of said Irving Short and advised his mother as to such death. The State Department knew almost immediately of said death and arranged to embalm and ship the body of the decedent home to Berkeley for burial. The burial was attended to in Berkeley by the mother, the said Ethel Grace Short.

The decedent died in a United States Army Hospital in Tokio. His brother, James Harvey Short, was present in Tokio at the time of the death of said Irving Short. The Veterans Administration was so advised. The brother could have sworn at any time to the fact of death of Irving Short and that the War Department promised to ship the body home.

That said Irving Ritchie Short had, prior to his death, taken his discharge from the United States Army after his service therein during World War No. II. He was a captain. When hostilities broke out in Korea, he was in Formosa and he went from there to Tokio to re-enlist in the United States

Army. On being given the required medical examination by the army doctors, it was found that he was seriously ill and was at once placed in a United States Army Hospital in Tokio in order that he might be given necessary medical care and treatment. It developed that he had polio. He died as a result of said disease within a few days after being placed in said hospital and while he was receiving such care and treatment for said affliction. The date of his death was August 30, 1950. Immediately thereafter, the Adjutant General's Office sent to the mother, Ethel Grace Short, a radiogram dated August 31st, 1950, which was in the same form as if said Irving Ritchie Short had again entered the military service.

A copy of said radiogram is as follows:

OA522

1950 Aug 31 PM
San Francisco Calif 31 350P

O.SFC853 Govt Pd-WUX
Mrs. Ethel M. Short
1386 Euclid Ave Berkeley Calif

From AGAO-C Signed Witsell The Adjutant General The Secretary of the Army Regrets to Inform You That Your Son Irving R Short Died 30 August in Tokyo Japan Pd He Was Hospitalized in Tokyo on 26 August Seriously Ill with Poliomyelitis Pd My Sympathy Is with You in Your Bereavement.

THE ADJUTANT GENERAL
Washington DC 3120572

That it is clear the War Department was advised as to said death prior to the time a claim was presented on said policy.

The hospital referred to in said radiogram was a hospital under the control of the United States Government and, under Regulation 3.55(b) of Title 38 of applicable Federal Regulations, the medical officer in charge of such hospital had authority to issue a certificate establishing the death of said Irving Short for the purpose of recovering under said life insurance policy.

That by a Speedletter dated September 20th, 1950, the State Department advised said Ethel Grace Short that she would have to provide said Department with $500.00 to meet the expense of shipping said Irving Ritchie Short's remains to Berkeley, California, because of the fact he was not in the military service of the United States when he died. A copy of said Speedletter is as follows:

Department of State
Washington 25, D. C.
Speedletter

In reply to
Date September 20, 1950

Sep 20 1950

Speedletter to
Mrs. Ethel Short,
1386 Euclid Avenue,
Berkeley, California.

Reference is made to the telegram sent to you by the Department of the Army on August 31, 1950,

informing you of the death of your son Irving R. Short on August 30, 1950, at Tokio, Japan. The Department of the Army has made a thorough Investigation of its records, both in the United States and Japan, and it has been definitely established that Mr. Short was not a member of the Armed Forces at the time of his death, and as a result the matter has been referred to this Dept. for final disposition of the remains.

You will understand, of course, that American consular officers do not have funds for the preparation and disposition of the remains of private American citizens who die within their consular jurisdiction. Therefore it will be necessary for you to make a deposit with the Dept. to cover any expenses incurred in connection with the preparation and eventual disposition of the remains. If it is your desire to have your son's body returned to the U. S. for interment, it is suggested that you forward to this Dept. a certified check, bank draft or Postal money order for $500 payable to the Secretary of State of the U. S. It will be necessary also for you to furnish also the name and address of the undertaker to whom the remains are to be consigned. On the other hand if it is your desire that the remains are to be interred locally, the Department will request the appropriate American counselor officer in Japan to obtain estimate of such costs for submission to you. Any unexpended balance of your deposit will be returned to you; however, if the expenses exceed the amount of your deposit, an additional deposit will be required.

The Dept. will appreciate a prompt attention to this matter.

Sincerely yours,

For the Sec. of State:

FRANCIS E. FLAHERTY,
Assistant Chief, Division of
Protective Services.

By air mail letter dated September 23rd, 1950, said Ethel Grace Short sent said State Department a draft for $500.00 to cover said expense and thereupon said State Department arranged to and did ship the body of Irving Short home to Berkeley for burial. Such an act would never have occurred without careful identification of the said body. The burial occurred in Berkeley, a fact known to the family and everyone concerned.

7.

That, as will be explained, the Army physician of said hospital who cared for said Irving Short in his last illness, issued a physician's certificate on a carefully prepared form used by life insurance to show the death of an insured person when claim is asserted on a policy of insurance issued by such companies. That this certificate was forwarded to the Veterans Administration by said Ethel Grace Short after she had filed her claim on said policy with said Veterans Administration. That said certificate was wholly disregarded by the Veterans Administration as evidence. It was obtained to supply proof of

death under a policy of insurance carried by decedent in favor of his mother, Ethel Grace Short, in the Prudential Life Insurance Company, but that said company, on being supplied with the radiogram hereinbefore mentioned, treated that as sufficient proof of death of Irving Short and did not require delivery of said physician's certificate as a condition of the payment of its policy. Said Certificate clearly established the fact of death of Irving Ritchie Short and the time and the cause thereof.

8.

That on or about September 15th, 1950, said Ethel Grace Short ascertained that decedent had been paying premiums on the aforesaid insurance policy copied in Par. 3. That, however, the policy itself could not at said time be found.

That on or about September 15, 1950, Mrs. Short phoned the district office of the Veterans Administration in Oakland, California, that decedent was probably carrying insurance and she was advised to call at said office and bring said radiogram hereinbefore mentioned. That a relative made said call on her behalf, as Mrs. Short was at said time confined to her home on account of illness. That Mrs. Short was provided with a form of claim to make out upon said policy. That she filled out this form and caused it to be left with said district office on or about September 25, 1950, together with said radiogram. That said office had the number of said policy and knew that the decedent had been paying premiums thereon.

That later, on or about October 18, 1950, said Ethel Grace Short received from said district office a postcard stating that the records regarding said claim were being forwarded to the Central Office of the Veterans Administration at Washington, D. C.

9.

Under date of November 1, 1950, said Ethel Grace Short, through her attorneys, wrote the Veterans Administration in Washington, D. C., that, according to the postcard received from the district office in Oakland, California, the records in the matter of the claim had been sent to the Central Office of the Veterans Administration in Washington. This letter explained that at the outbreak of the Korean War, Irving Short was in Formosa, that he was a veteran of World War II, that he went from Formosa to Tokio to again enter the service and that his medical examination showed he was ill with polio and that he was placed in the Army Hospital in Tokio for treatment, where he died in a few days.

Thus, about Novmber 1, 1950, the Veterans Administration was specifically advised that Irving Short died while he was a patient in the United States Army Hospital in Tokio.

In addition, the latter fact was indicated in the death notice radiogram, dated August 31, 1950, which was delivered to the Veterans Administration, along with the claim of said Ethel Grace Short.

Said letter explained Mrs. Short was not well and asked that the case be given special attention.

Mrs. Short had no knowledge whatever that said insurance policy had been changed so as to name contingent beneficiaries, but the Veterans Administration did know of that fact and, in view of Mrs. Short's illness, said office should have acted promptly in passing on her claim.

10.

In reply to the aforesaid letter dated November 1, 1950, written to the Veterans Administration by the attorneys for Mrs. Short, a form letter dated November 17, 1950, was sent to said Ethel Grace Short at her residence at 1386 Euclid Avenue, Berkeley, California, which called attention to the fact that the claim submitted by Mrs. Short had not been signed and said letter also indicated that Mrs. Short should sign a claim on Form 8-355c and that on Form 8-150a she should indicate the type of settlement which she elected to have upon such claim. These forms were enclosed. Said letter of November 17, 1950, was the first indication that Mrs. Short had failed to regularly sign said claim as originally filed, although over a month had passed since such filing.

11.

With a letter dated November 24, 1950, Mrs. Short, through her attorneys, forwarded to the said Veterans Administration her new claim upon the aforesaid insurance policy, duly made out upon said Form 8-355c, and she also sent her so-called election

to receive payment of said policy in 36 equal monthly installments.

12.

Mrs. Short received a letter dated December 6, 1950, from Edward F. Witsell, Major General, United States of America, the Adjutant General, which was written in reply to her letter of October 5, 1950, and this letter definitely stated that it had been ascertained that on July 22, 1950, the State Department had sent a message to the Army in Japan saying that Irving Ritchie Short had expressed a desire to go to Japan for the purpose of requesting call to extended active duty and that on August 12, 1950, authority was granted for him to enter Japan and to travel by military transportation on a space available basis and that, therefore, his entry into Japan was for his own convenience and not in compliance with orders from the Army and that he had not been recalled to active service and that the Army could not reimburse her, Mrs. Short, for expenses incident to his death. This letter stated that the son's remains had been shipped to the United States aboard the U. S. N. S. General Gaffey, and that said vessel would arrive at Fort Mason, San Francisco, California, on or about December 12, 1950, and that as the shipment was on a space available basis, that would relieve Mrs. Short of cost of the transportation.

That from said letter of December 6th, 1950, hereinbefore referred to, it is clear that had the Veterans Administration requested the information

from the War Department, it could at once have ascertained that said Irving Short was not again in military service at the time of his death.

The fact was that, while claiming it must have such information, the Veterans Administration made no request upon the Army therefor until on or about April 23, 1951. If the matter was important, about four months' time was wasted.

13.

Under date of December 22nd, 1950, the Veterans Administration, in response to an inquiry from the attorneys for Mrs. Short, sent a form letter to Mrs. Short, which referred to her claim and which inserted crosses in a box opposite the printed statement, reading:

"This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

The following printed sentence was also checked:

"You will be further advised at the earliest possible date."

On January 18th, 1951, the attorneys for Mrs. Short wrote the Veterans Administration saying that Mrs. Short had heard nothing further in regard to the claim.

On February 21st, 1951, the attorneys for Mrs. Short sent to the Veterans Administration a similar letter.

Under date of March 5th, 1951, the Veterans Administration sent to said attorneys a form letter acknowledging the receipt of the two preceding letters and inviting attention to the printed language marked with crosses. This language was, in substance, the same as that hereinbefore mentioned in the prior form letters. This form letter last mentioned contained also the following:

> "Action on this claim is pending receipt of an official report of death from the Service Department."

Under date of March 31st, 1951, the attorneys for Mrs. Short wrote the Veterans Administration asking for the meaning of the expression last quoted. The attorneys for Mrs. Short were in a quandary as to what the Veterans Administration was trying to get, as it seemed utterly clear that Irving Short was dead and that the fact of his death had been accepted both by the War Department and by the State Department. Said attorneys believed that it was the fact of death that the Veterans Administration should have been concerned with. Said letter of March 31, 1951, contained the following:

"Your letter dated March 5, 1951, which was in response to our letter of February 18, 1951, certainly does not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

> " '6. Action on this claim is pending receipt

of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?

"Will you please let us know what is meant by the expression quoted?"

Said letter also contained the following:

"Harvey Short, his brother, was in Tokio when Irving Short arrived. The medical examination showed Irving had polio. He died very soon after this examination and while in the government hospital. Harvey wired his mother that the remains would be sent on by the Army. After considerable delay, a speed letter came from the State Department saying that Irving was not back in the service at his death and that Mrs. Short must send $500.00 to meet the expense of returning the body. We attended to the sending of this money, but we complained because it struck us that Irving was, for all practical purposes, serving his country when he died and we thought the argument made was very unjust. Weeks and weeks passed before the shipment occurred. After pleading for information, a letter dated December 6, 1950, finally came from the Adjutant General's Office to Mrs. Short. The letter stated that space for shipment of the remains on the General Gaffey had been arranged.

The funeral occurred here. Are you concerned

over proof of death? The son, Irving Short, is buried here.

Why cannot the mother be advised as to what is the real cause of this great additional delay, so that she can help in supplying any information that you may need?''

14.

Mrs. Short wrote a letter dated April 1, 1951, to the Veterans Administration complaining of the delay; that she received from the Veterans Administration a letter dated April 24, 1951, which read, as follows:

April 24, 1951.

Mrs. Ethel G. Short,
1386 Euclid Avenue,
Berkeley 8, California.

Dear Mrs. Short:

Reference is made to your letter of April 1, 1951, enclosing letter dated October 26, 1950, from Col. Washington M. Ives, Jr., Executive, General Headquarters, Far East Command, and letter dated September 11, 1950, from the Chinese Embassy, Washington, D. C.

Before settlement of the $10,000 National Service Life Insurance may be made to you as beneficiary of the above-named veteran, it is necessary under Veterans Administration regulation that there be of record proof of death of the above-named veteran. This office is endeavoring to obtain an official report of death from the Service Department, however, it

seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.

Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised.

Returned herewith are the letters you enclosed as requested.

Very truly yours,

R. J. HINTON,

Director, Dependents and Beneficiaries Claims Service.

The said letter last mentioned took the untenable position that proof of death of Irving Ritchie Short could be established only in some one particular way.

15.

Under date of April 24, 1951, the attorneys for Mrs. Short received an additional letter from the Veterans Administration which merely acknowledged on a form the receipt of the letter of March 31st, 1951.

16.

Under date of May 15th, 1951, the attorneys for Mrs. Short wrote a letter to the Veterans Administration stating their position, as follows:

"Of course, so far as this death claim is concerned, the material fact is that Irving R. Short is dead."

This letter called attention to the fact that the Prudential Life Insurance Company had paid an insurance policy on the life of the decedent and it accepted the death radiogram of August 31, 1950, as sufficient proof of death.

This letter pointed out that a death certificate had been obtained for the said Prudential Life Insurance Company, but was not eventually required as a condition of the paying of their policy.

With the said letter dated May 15th, 1951, the attorneys for Mrs. Short forwarded to the Veterans Administration the said physician's certificate.

The said letter of May 15, 1951, declared:

"Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert H. Brown & Co. We can supply you with proof of the burial."

The undertaker had also received a death certificate and an embalmer's certificate.

17.

On June 18, 1951, said Veterans Administration sent to the attorneys for Mrs. Short a letter, which letter recited that a report from the Army states that Irving Ritchie Short was not in active service at the time of his death and that a report of death was not available at "that office." The letter also contained the following:

"As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State Department. When this evidence is on file, prompt action will be taken on the claim."

That, as a matter of fact, said Veterans Administration received said army report about April 23, 1951.

18.

On June 20th, 1951, the attorneys for Mrs. Short wrote a letter to the said Veterans Administration, which opened with the statement:

"Mrs. Ethel G. Short died on June 14, 1951."

A copy of the letter last mentioned reads as follows:

June 20, 1951.

Veterans Administration,
Washington 25, D. C.

8BAAC.
Short, Irving R.
XC—16 522 204.

Attention: R. J. Hinton, Director, Dependents and Beneficiaries Claims Service.

Dear Mr. Hinton:

Mrs. Ethel G. Short died on June 14, 1951.

We are acting for her son, Harvey Short (James Harvey Short), who will attend to the probate of the estate of his mother, either personally or through his wife, Margaret D. Short.

As your department knows and as the State Department knows, the son, Irving R. Short, above mentioned, died on August 30, 1950. The payments upon the decedent's policy referred to above were not made to the mother, Mrs. Ethel G. Short, simply because your department did not know whether Irving R. Short was or was not in the Military Service at the time of his death. If he was in the Military Service, the War Department decided the fact of death. If he was not in the Military Service, the State Department decided the fact of death. You have never claimed that you could not settle the matter by taking proof from both departments.

You have now delayed until Mrs. Short is dead. The War Department was satisfied that Irving Short was dead. They sent a telegram to that effect.

You have a copy and you have a doctor's certificate that came from the hospital that ought to satisfy either department. The State Department was satisfied that the young man was dead. It sent letters to that effect and made Mrs. Short put up $500.00 to have the body shipped home for burial. They received and used the money for that purpose. After protracted delay, the War Department and the Navy Department had the body shipped on the U.S.N.S. General Gaffey and the burial was attended to here by Albert Brown and Company, the undertakers. So the War Department, the State Department, the Navy Department, and the undertaker, the doctor, and the relatives all know that the young man is dead, and yet payment to Mrs. Ethel Short was held up, and now she is dead. We do not believe your rules were designed to accomplish such injustice.

We understand that under the terms of the policy, which the War Department issued upon the life of Irving Short, the funds payable will now become payable to the brother, Harvey Short, also known as James Harvey Short.

(Page 2.)

Mrs. Short's husband was James Vernon Short. We attended to the probate of his estate. He died on March 3, 1945, leaving as his sole heirs at law his said wife and two sons, the said Irving R. Short and Harvey Short. The death of the son, Irving Short, occurred on August 30, 1950. He was unmarried at

the time of his death and left no issue. His mother was his sole heir and she was designated in the policy as the beneficiary.

Do you want proof of death of the father, and if so, what proof?

Do you want proof of death of the mother and if so, what proof?

As Major Harvey Short is home on leave from Korea and will have to go back to Korea very shortly, please advise us at once as to what proof we should supply to you in order to establish his rights under the insurance policy involved.

Kindly answer the following questions:

1. Who will get the payments that you should have paid to Mrs. Ethel Short up to January 14, 1951, the date of her death?

2. Will the past due payments have to be collected by the administratrix of Mrs. Short's estate?

3. Will the future payments be a part of the estate of Mrs. Ethel Short?

4. Will the future payments be payments to the surviving brother and will they be no part of the estate of Ethel Short?

Please send on any forms that have to be executed in order to obtain the benefits of this policy.

Before she died, Mrs. Short supplied to your local office in Oakland a statement in which she agreed to accept payments on the policy in a cer-

tain way. That statement has been sent on to your office. Please furnish us with a copy of the statement, as we failed to keep a copy.

As we understand, your department is a part of the War Department. Assuming that is true, did not the War Department determine that Irving R. Short was not in the service, when it forced Mrs. Short to pay to the State Department $500.00 for shipping the body of Irving R. Short home?

Why was not Mrs. Short supplied with some account that showed whether they had or had not used up her $500.00?

(Page 3.)

Mrs. Short was given to understand that as there was "available space" in the U.S.N.S. Gaffey, no freight charge would be imposed for the shipping of the body.

To what office should we send a communication on behalf of the estate of Ethel G. Short to find out whether the whole of the $500.00 was used up?

Kindly use air mail in reply.

We enclose air mail envelope for this purpose.

You sent back our air mail envelopes heretofore, but time is important in this matter and we wish you would please use the one sent herewith.

We have told you that we are willing to meet any expense necessary to your prompt handling of the matter, but you felt you should pay no attention to this. If you need money for telegrams or radiograms, please let us know.

We think this young man was willing to give his life to the service and yet the mother's claim was simply bogged down by your regulations and forms which are protecting no one.

Yours truly,

CLARK & MORTON,

By G. CLARK,

Attorneys for Harvey Short, and Attorneys for Estate of Ethel G. Short.

On July 11, 1951, the attorneys for Mrs. Short wrote a letter to the State Department, complaining of the delay connected with Mrs. Short's claim and explaining that Mrs. Short had died.

On December 26, 1951, said attorneys received a reply to the letter last mentioned which stated that a copy of the report of the death involved had been sent to the Veterans Administration on July 3, 1951. The first paragraph of said letter of December 26, 1951, read:

"The receipt is acknowledged of your letter dated July 11, 1951, concerning the death of Irving R. Short, which occurred on August 30, 1950, at Tokyo, Japan. You enclosed with your letter a copy of a letter from the Veterans Administration requesting an official report of the death of Irving R. Short, and in this connection, a copy of the report of death was sent to the Veterans Administration on July 3, 1951."

It took from July 11, 1951, to December 26, 1951, to get word from the State Department that they

had advised the Veterans Administration on July 3, 1951, that Irving Ritchie Short was dead.

Neither the attorneys for Mrs. Short or the members of the Short family were ever furnished with this report last mentioned. Nor is there any form prescribed for such a report, and no regulation required any such report. This was a death that could be proved in the simple ordinary way.

19.

That under date of July 11, 1951, the Veterans Administration sent to the attorneys for Mrs. Short a letter which acknowledged the receipt of their letter of June 20, 1951, and advised the said attorneys that nothing would be paid Mrs. Short under the said insurance policy, but that the amount payable under said policy would be paid to James Harvey Short, hereinbefore mentioned, and Berkshire Industrial Farm of Canaan, New York, as these two payees were named as contingent beneficiaries in the policy; that said letter stated:

"As the principal beneficiary died before receiving insurance benefits, the full amount of the insurance, including the monthly payments which should have been paid to Ethel Grace Short for the period from the date of the Veteran's death to the date of her death is payable to the contingent beneficiaries in the amounts designated by the insured."

The plaintiff alleges that the legal position last referred to is unsupportable—

(a) Because there was no reason for postponing the determination of the fact of Irving Short's

death until after the date of the death of his mother, which occurred on June 14, 1951.

(b) Because by the Insurance Act of 1946, the provision was taken out of the law that a beneficiary could acquire no right to payments under a National Service Life Insurance policy unless he was living and unless he actually received the payment in hand.

Plaintiff further alleges that if she, as administratrix of the estate of Ethel Grace Short, deceased, is not entitled to the monthly payments that accrued on said insurance policy up to June 14, 1951, then a proper construction of the Insurance Act of 1946 is that the whole amount unpaid on the policy hereinbefore mentioned was payable to the estate of the insured, to wit, the Estate of Irving Ritchie Short.

20.

That the Veterans Administration and the Director of Dependents and Beneficiaries Claims Service finally decided and determined on November 29, 1951, that the amounts payable on said policy were payable equally to James Harvey Short and Berkshire Industrial Farm.

That plaintiff and said James Harvey Short duly appealed from said determination to the Board of Veterans Appeals within sixty days from said decision and determination.

That on May 2, 1952, said Board affirmed the aforesaid ruling that had been made in said case.

That in the period for taking said appeal, there

was no administrator or legal representative of the estate of said Irving Ritchie Short, deceased. Mrs. Short had been the administratrix of the estate of said Irving Ritchie Short up to the time of her death on June 14, 1951, and thereupon the public administrator of Alameda County, California, became entitled to act as administrator of the estate of Irving Ritchie Short. That, however, said public administrator took no action to be appointed such administrator and waived his right in favor of James Harvey Short, who was thereupon appointed administrator of said estate and who now is the duly appointed, qualified and acting administrator of the estate of said Irving Ritchie Short, deceased.

In appealing the case referred to, said James Harvey Short did so as the holder of any and all rights created in his favor under said policy of insurance. That he set forth that said Irving Ritchie Short left no Will and that said Ethel Grace Short was the sole heir at law of said Irving Ritchie Short; that said Ethel Grace Short left no Will and that he, James Harvey Short, was the sole heir at law of said Ethel Grace Short; that there were no claims against the estates of said decedents and that he was entitled to the estates of said decedents. That such were the facts.

That this suit was begun only after exhausting all available administrative proceedings.

21.

That a dispute exists as between the plaintiff and the remaining defendants in this action as to the

proper construction and effect of said insurance policy and as to how the sums should be paid which are payable on the insurance policy herein mentioned and that the plaintiff is entitled to have declared and determined what rights she may have under the said insurance policy; that such a decree is necessary to a determination of this action.

22.

That the plaintiff has made parties to this action all persons who might have any claim to the proceeds of the insurance policy hereinbefore mentioned.

Wherefore, the plaintiff prays judgment declaring her rights and the rights of the defendants under said insurance policy and that plaintiff shall have judgment upon said policy for such of the 36 equal installments as had accrued thereon prior to June 14, 1951, and that the Court shall determine the rights of all persons under said policy and grant such other and further order as may be proper.

Dated: June 6, 1952.

/s/ GEORGE CLARK,
Attorney for Plaintiff,
Margaret D. Short.

CLARK & MORTON,

By /s/ GEORGE CLARK,
Also Attorneys for Plaintiff.

[Endorsed]: Filed June 6, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, one of the defendants above named, and answering Complaint of plaintiff on file herein, admits, denies, and alleges as follows:

1.

Answering paragraphs 1 and 2 of plaintiff's complaint, this answering defendant admits all the allegations therein contained save and accept that portion of paragraph 2 commencing on line 32, page 2, with the word, "Said" to and including the word "plaintiff" on line 4, page 3, and to this portion of said paragraph this answering defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained.

2.

Answering paragraphs 3, 4a and 4b, this answering defendant admits all the allegations therein contained.

3.

Answering paragraph 5 of plaintiff's complaint, this answering defendant admits all the allegations therein contained save and except that portion of paragraph 5 commencing on line 8, page 4, with the word, "That," to and including the word, "policy" on line 13, page 4, and that further portion of paragraph 5 beginning on line 25, page 4, with the word,

"It," to and including the phrase, "after June 14, 1951" on line 29, page 4, to which portions of paragraph 5, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

4.

Answering paragraph 6 of plaintiff's complaint, this answering defendant does not have sufficient information and belief as to the allegations therein contained from line 1, page 5, beginning with the word, "The," to and including the word, "treatment" on line 22, page 5, and basing its denial on such lack of information and belief denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof. Plaintiff admits all the rest of the allegations in paragraph 6 of plaintiff's complaint which have not been herein specifically.

5.

Answering paragraph 7 of plaintiff's complaint, this answering defendant admits all the allegations therein contained, save and accept that portion of paragraph 7 which begins on line 25, page 7, with the word, "That," to and including the word, "thereof," on line 3, page 8, and to that portion of paragraph 7, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

6.

Answering paragraphs 8, 9, 10, and 11 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained.

7.

Answering paragraph 12 of plaintiffs' complaint, this answering defendant does not have sufficient information or belief as to the allegations therein contained and basing its denial on such lack of information and belief denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

8.

Answering paragraph 13 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained.

9.

Answering paragraph 14 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained, save and except that portion of paragraph 14 which begins on line 31, page 12, with the word, "The," to and including the word, "way," on line 32, page 12, and to that portion of paragraph 14, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained.

10.

Answering paragraphs 15, 16, 17, and 18, this

answering defendant admits all the allegations therein contained.

11.

Answering paragraph 19 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained, save and except that portion of paragraph 19 beginning with line 26, page 17, with the word, "The," to and including the word, "Short" on line 14, page 18, and as to those allegations, defendant denies generally and specifically, each and every, all and singular, the allegations therein contained.

12.

Answering paragraphs 20, 21, and 22, of plaintiffs' complaint, this answering defendant admits the allegations therein contained.

13.

As a second, separate, and distinct defense to plaintiffs' complaint, this answering defendant alleges that the alleged claim and dispute of the plaintiff herein is barred by the provisions of Section 802(u) of Title 38 U.S.C. which reads in part as follows:

"* * * and in any case in which * * * a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether ac-

crued or not) shall be paid in one sum to the estate of the insured: * * *."

Defendant alleges that plaintiff's decedent by the terms and provisions of the policy of insurance issued to Irving Ritchie Short under National Service Life Insurance was not entitled to a lump sum settlement.

14.

As and for a third, separate, and distinct defense to plaintiff's complaint, this answering defendant alleges that plaintiff herein and co-defendant James H. Short, as administrator of the estate of Irving Ritchie Short are barred from and not entitled to the proceeds of National Service Life Insurance policy 8-041-741 issued to Irving Ritchie Short, deceased, by virtue of the provisions of Section 8.91(b) of Title 38 C.F.R. which reads:

"If the principal beneficiary of National Service Life Insurance maturing on or after August 1, 1946, does not survive the insured or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in accordance with the provisions of § 8.77."

Defendant further alleges that the insurance policy which is the subject of the dispute of the above-entitled matter, matured after August 1, 1946, and further alleges that the principal beneficiary, Ethel Grace Short, deceased, was not entitled to a

lump sum settlement under the provisions of said policy and further alleges that Ethel Grace Short died before commencement of payment to her as principal beneficiary under the terms of the policy. Defendant further alleges that pursuant to the provisions of the designation of beneficiary executed by Irving Ritchie Short, deceased, on August 25, 1949, defendant, James Harvey Short, individually and defendant, Berkshire Industrial Farm of Canaan, New York, were designated as contingent beneficiaries of $5,000 each of the proceeds of said insurance policy and are entitled, pursuant to the provisions of Section 8.91(b) of Title 38 C.F.R. to the proceeds of the insurance policy, which is the subject of the above-entitled matter.

Wherefore, this answering defendant prays that plaintiff take nothing by its Complaint, that said Complaint be dismissed, that defendants be awarded its costs of suit herein incurred for such other and further relief as to this court may seem meet and proper in the premises.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Defendants.

[Endorsed]: Filed October 14, 1952.

[Title of District Court and Cause.]

ANSWER OF BERKSHIRE INDUSTRIAL FARM

Now comes the Defendant, Berkshire Industrial Farm, a corporation, one of the defendants named in the above-entitled action, and therein referred to as "Berkshire Industrial Farm of Canaan, New York," and answering the Complaint of the Plaintiff on file herein admits, denies and alleges as follows:

First Defense

1. This answering Defendant alleges that it is now and at all the times mentioned in this Answer or in the said Complaint it was a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, and as such, under the laws of the State of New York, duly authorized to take by gift personal property and hold the same for its proper purposes, and does now, and at all the times hereinafter in this First Defense mentioned, it did under the provisions of the Social Welfare Law of the State of New York, possess the general powers and was and is subject to the general restrictions and liabilities of incorporated charitable institutions (Book 52-A, "McKinney's Consolidated Laws of New York," Sec. 472-e). This answering Defendant alleges that it was sometimes known as "Berkshire Industrial Farm of Canaan, New York," and that on the first day of January, 1925, and prior thereto, and ever since that date it has

had and still has its principal place of business in Canaan in the State of New York.

2. Answering Paragraph 1 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of the last sentence of Paragraph 1 commencing on line 9, page 2, with the word "That," to and including the word "death" on line 11, page 2, and to this portion of said sentence this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

3. Answering Paragraph 2 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 2 commencing on line 32, page 2, with the word "Said," to and including the word "plaintiff" on line 4, page 3, and to this portion of said paragraph this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

4. Answering Paragraphs 3, 4a, and 4b, this answering Defendant admits all the allegations therein contained.

5. Answering Paragraph 5 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained save and except that portion of Paragraph 5 commencing on line 8, page 4, with the word "That," to and including the word

"policy" on line 13, page 4, and that further portion of Paragraph 5 beginning on line 25, page 4, with the word "It," to and including the word "forth" on line 31, page 4, to which portions of Paragraph 5 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof. This answering Defendant, further answering Paragraph 5 of the Plaintiff's Complaint, alleges and contends that the Estate of said Ethel Grace Short has no right under said policy, because Ethel Grace Short, was at no time entitled to a lump-sum settlement of the insurance owing on said policy, and prior to her death on June 14, 1951, she had failed to establish the death of her son with evidence that was satisfactory to the Veterans' Administration, or such as was required under its duly-adopted rules and regulations, and in particular such as was required under 38 C.F.R. 3.27, 3.30, 3.32, 8.52 (a), (b), (c), (d), (e) or (f), or any of them.

6. Answering Paragraph 6 of the Plaintiff's Complaint, this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments therein contained, which commence on line 2, page 5, with the word "The" and continue to and including the word "treatment" on line 22, page 5. This answering Defendant admits all the rest of the allegations in Paragraph 6 of the Plain-

tiff's Complaint which have not been denied as aforesaid.

7. Answering Paragraph 7 of Plaintiff's Complaint, this answering Defendant admits all the allegations contained therein save and except that portion of Paragraph 7 which begins on line 25, page 7, with the word "That" to and including the word "thereof" on line 3, page 8, and to that portion of Paragraph 7 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations contained therein, and the whole thereof. This answering Defendant, further answering Paragraph 7 of Plaintiff's Complaint, alleges that the physician's certificate referred to in Paragraph 7 of the Complaint was not executed under oath as required by 38 C.F.R. 3.30.

8. Answering Paragraph 8 of Plaintiff's Complaint, this answering Defendant admits all the allegations of facts therein contained.

9. Answering Paragraph 9 of Plaintiff's Complaint, this answering Defendant admits all the allegations of facts therein contained in the first paragraph thereof commencing with the word "Under" on line 26, page 8, to and including the word "days" on line 3, page 9, and this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments made in said Paragraph 9 of Plaintiff's Complaint in the last sub-

paragraphs thereof, commencing with the word "Thus" on line 4, page 9, and ending with the word "claim" on line 17, page 9.

10. Answering Paragraphs 10, 11, 12, and 13 of Plaintiff's Complaint, this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments therein contained.

11. Answering Paragraph 14 of Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained save and except that portion of Paragraph 14 which begins on line 31, page 12, with the word "The," to and including the word "way" on the last line below line 32 on page 12, and to that portion of Paragraph 14 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

12. Answering Paragraphs 15, 16, and 17 of Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained.

13. Answering Paragraph 18 of Plaintiff's Complaint, this answering Defendant admits the allegations therein on line 15, page 14, beginning with the word "Mrs." and ending with the figures "1951," and alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the other averments therein contained.

14. Answering Paragraph 19 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 19 beginning on line 26, page 17, with the word "The," to and including the word "Short" on line 14, page 18, and to that portion of Paragraph 19 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

15. Answering Paragraphs 20, 21, and 22 of Plaintiff's Complaint, this answering Defendant admits the allegations therein contained.

Second Defense

1. This answering Defendant alleges that the Complaint fails to state a claim against it or its co-defendants upon which relief can be granted.

Third Defense

This answering Defendant alleges as follows:

1. Plaintiff's decedent, Ethel Grace Short, was the first or primary or principal beneficiary of the policy of insurance in the sum of $10,000.00 and numbered 8 041 741, which is the subject of dispute in this action, and she was such at the time of the death of the insured thereunder, her son.

2. The said insured died in Tokio, Japan, on August 30, 1950.

3. The said insured at the time of his death was

not a member of the armed forces of the United States of America.

4. By a designation of beneficiaries executed by the insured on or about August 25, 1948, said Ethel Grace Short was designated as the first or primary or principal beneficiary of said policy of insurance, and James Harvey Short, her son, individually, and this answering Defendant were designated as contingent beneficiaries of said policy of insurance in the respective sums of $5,000.00 each, and said James Harvey Short, individually, and this answering Defendant, at the time of the death of said insured were such contingent beneficiaries.

5. By the terms and provisions of said policy of insurance, the insured thereunder had not elected or provided, nor had he ever elected or provided for a lump-sum settlement for his mother, Ethel Grace Short, for any insurance which might become payable to her; and said Ethel Grace Short was not entitled to a lump-sum settlement of such insurance.

6. The said Ethel Grace Short survived said insured but died later on June 14, 1951, and before payment of said insurance had commenced.

7. The said policy of insurance matured after August 1, 1946.

8. The said contingent beneficiaries of said policy of insurance, James Harvey Short and this answering Defendant, survived the insured and survived said Ethel Grace Short and are still surviving and in being.

9. The Veterans' Administration, since the death of said Ethel Grace Short, has decided that the two contingent beneficiaries of said policy of insurance are entitled to receive the said insurance in the respective sums of $5,000.00 each, and this decision was later affirmed before the commencement of this action by the Board of Veterans' Appeals.

10. All the facts recited above are admitted in the averments made in the Complaint of the Plaintiff on file in this action.

11. Under these facts so admitted, James Harvey Short, individually, and this answering Defendant, under the terms and provisions of said policy of insurance, were and are entitled to receive all of such insurance in equal shares as authorized by the provisions of Sec. 802(t) and Sec. 802(u) of Title 38 U.S.C., and by the provisions of 38 C.F.R. 8.91(b).

12. The said Ethel Grace Short, the claimant for said insurance, had the burden of proving her claim, and prior to her death she had presented no evidence of the death of the insured that was satisfactory to the Veterans' Administration or that met the reasonable standards required by their regulations, duly authorized by law, and in particular, 38 C.F.R. 3.27, 3.30, 3.32, 8.52(a), (b), (c), (d), (e) and (f).

13. This answering Defendant is now and at all the times hereinabove mentioned it was a corporation duly organized, created and existing under and

by virtue of the laws of the State of New York, and as such under the laws of the State of New York it was duly authorized to take by gift personal property and hold the same for its proper uses and purposes, and does now and at all the times hereinabove mentioned it did, under the provisions of the Social Welfare Law of the State of New York, possess the general powers and was and is subject to the general restrictions and liabilities of incorporated charitable institutions (Book 52-A "McKinney's Consolidated Laws of New York," Sec. 472-e, 472-f, 472-p, 472-q).

Wherefore, this answering Defendant prays that Plaintiff take nothing by her Complaint, that said action be dismissed, that Defendants be awarded their costs of suit herein incurred, that the decision of the Veterans' Administration as affirmed by the Board of Veterans' Appeals as alleged in said Complaint be approved by this Court, and for such other and further relief as to this Court may seem meet and proper.

Dated: May 29, 1953.

WRIGHT & LARSON,

By /s/ RANDELL LARSON,
Attorneys for Defendant,
Berkshire Industrial Farm.

[Endorsed]: Filed May 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JAMES HARVEY SHORT, INDIVIDUALLY AND AS ADMINISTRATOR

Comes now the defendant, James Harvey Short, appearing individually and as Administrator of the Estate of Irving Ritchie Short, deceased, and answers the Complaint on file herein and admits and alleges, as follows:

1.

Defendant alleges that he is the duly appointed, qualified and acting Administrator of the Estate of Irving Ritchie Short. That the decedent last named was also known as Irving R. Short and also known as Irving Short. That said Irving Ritchie Short was the same person whose life was insured under that certain National Service Life Insurance policy which is numbered 8-041-741 and which is dated February 15th, 1943, and which is described in Paragraphs 1, 2, and 3 of the Complaint herein.

That Irving Ritchie Short died on August 30th, 1950.

That Ethel G. Short, named in said insurance policy as the primary beneficiary thereof, died on June 14th, 1951, and that she, the said Ethel G. Short, was the mother of and the sole heir at law of said Irving Ritchie Short.

That the plaintiff herein is the duly appointed, qualified and acting Administratrix of the Estate of Ethel G. Short, deceased.

That the defendant, James Harvey Short, is the sole heir at law of said Irving Ritchie Short, deceased.

2.

Defendant hereby refers to the allegations of the Complaint herein which are numbered 1 to 22, inclusive, and he hereby admits all of the allegations of the complaint so referred to and he alleges the same to be true.

Wherefore, the defendant prays that judgment be entered herein declaring the rights of all the defendants in this case under the insurance policy mentioned and described in Paragraphs 1, 2, and 3 of the Complaint herein, and first that it shall be determined that the defendant, as Administrator of the Estate of Irving Ritchie Short, deceased, is entitled to the entire amount payable under the said policy of insurance and secondly that, if it is not so determined, then that it shall be determined that the estate of Ethel G. Short is entitled to payments on said claim in equal monthly installments in accordance with the claim described in Paragraph 11 of the Complaint, such payments to run from the death of Irving Ritchie Short, on August 30th, 1950, to the death of said Ethel G. Short on June 11, 1951, and that in any event said James Harvey Short is individually entitled to recover one-half of the amount of said policy not payable to the estate of said Ethel G. Short, deceased, and further that the Court shall grant such other relief as may be proper.

Dated: May 29th, 1953.

/s/ F. V. CORNISH,

Attorney for Defendant, James Harvey Short, Individually and as Administrator.

Duly verified.

Service of Copy acknowledged.

[Endorsed]: Filed June 1, 1953.

[Title of District Court and Cause.]

AMENDMENT OF ANSWER OF BERKSHIRE INDUSTRIAL FARM, DEFENDANT

Now comes the Berkshire Industrial Farm, a corporation, one of the Defendants in the above-entitled action, and, with the written consent of the Plaintiff herein, the adverse party, first had and obtained and filed herein, amends its Answer now on file in said action by amending the first sentence in paragraph 5 of its First Defense so that said first sentence shall hereafter read as follows, to wit:

"5. Answering Paragraph 5 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 5 commencing on line 8, page 4, with the word "That," to and including the word "policy" on line 13, page 4, and that further portion of Paragraph 5 beginning on line 25, page 4, with the word "It," to and including the word

"unreasonable" on line 29, page 4, to which portions of Paragraph 5 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof."

and so that the remainder of said paragraph 5 of its First Defense shall not be affected by this Amendment.

Dated: June 17, 1953.

WRIGHT & LARSON,

By /s/ RANDELL LARSON,

Attorneys for Said Defendant, Berkshire Industrial Farm.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1953.

[Title of District Court and Cause.]

STIPULATION OF FACTS AND FOR HEARING AND SUBMISSION OF CASE PURSUANT TO STIPULATION

It Is Stipulated by the parties to the above cause that the facts admitted by the pleadings and the facts hereinafter set out are true and that their rights depend upon and shall be determined by the Court therefrom. Should it appear that any fact admitted by the pleadings is at variance with a fact herein stipulated to, the admission of the pleadings shall be controlling.

It is not intended by this stipulation that the defendants admit to any legal conclusions which would estop them from denying the right of plaintiff or asserting the rights of defendants to the proceeds of the insurance policy referred to in the complaint.

The defendants reserve the right to object to any of the facts herein recited upon the grounds that such facts are not relevant, nor material to a decision in the case.

The facts stipulated to are as next set out.

Item 1:

Irving Ritchie Short was a veteran of World War II.

He died on August 30th, 1950.

Prior to his death he had been honorably discharged from the United States Army and he was not a member of the armed forces of the United States at the time of his death. At the time of his discharge from the army he had the rank of Captain.

He was sometimes referred to as Irving R. Short and sometimes as Irving Short.

Item 2:

At the time of the veteran's death, there was in effect upon his life a National Service Life Insurance Policy of $10,000.00, which policy is the basis of the claims of the respective parties to this case.

The policy became effective January 1, 1943.

A copy of said policy is set out in Paragraph 3 of the Complaint.

The policy designated Mrs. Ethel Grace Short, the mother of the insured, as principal beneficiary.

Mrs. Ethel Grace Short was sometimes referred to as Mrs. Ethel G. Short or as Mrs. Ethel Short or as Ethel Short. At times she is referred to herein as Mrs. Short.

Mrs. Short had one other son, who is still living and whose name is James Harvey Short. He is also known as James H. Short or as Harvey Short.

Item 3:

Before his death, the insured duly designated as equal contingent beneficiaries under said policy the following:

James Harvey Short, his brother, and Berkshire Industrial Farm of Canaan, New York.

Said James Harvey Short is still living.

Said Berkshire Industrial Farm of Canaan, New York, was and is qualified to be a contingent beneficiary under said insurance policy.

Item 4:

The insured did not make any election as to the manner in which a beneficiary receiving a payment of an amount under said policy should receive such payment.

Item 5:

Ethel G. Short died on June 14, 1951, which was before it was determined by the officials of the Vet-

erans Administration having authority to pass on her claim under said policy that her son, Irving Ritchie Short, was dead.

The plaintiff, Margaret D. Short, is the Administratrix of the Estate of said Ethel Grace Short, deceased. Letters of Administration on said estate were duly issued to said Margaret D. Short on July 3rd, 1951, and they are still in effect. She is the wife of James Harvey Short.

Item 6:

Said James Harvey Short is Administrator of the Estate of Irving Ritchie Short, Deceased. Letters of Administration on said estate were duly issued to said James Harvey Short on April 10, 1952, and they are still in effect.

Item 7:

Said Ethel Grace Short was the sole heir at law of the son, Irving Ritchie Short.

And James Harvey Short is the sole heir at law of his mother, Ethel Grace Short.

Both the son and the mother died intestate. No distribution has occurred in either estate and no order has been made in either estate purporting to affect any right under said insurance policy.

Item 8:

As stated, said Irving R. Short died on August 30, 1950. He died in a United States Army Hospital in Tokio, Japan, in which hospital he was at the time receiving medical treatment for polio. He had

been hospitalized and placed in said hospital under the following circumstances:

On the outbreak of hostilities in Korea, he had gone from Formosa to Tokio and he had there duly applied to enter again into active service in the army in Tokio. This required a medical examination by the army authorities in Tokio. This was duly arranged for. On the making of this examination, it was ascertained by the physician making the examination that the applicant was seriously ill; that his symptoms indicated that he had polio and that he required immediate hospitalization and medical treatment. His brother, James Harvey Short, who was in the army and was in Tokio on the way to Korea at the time, was advised as to his brother's condition. It was at once agreed that necessary medical treatment of the applicant could be provided in Tokio only in one of the hospitals then being maintained by the United States Army in Tokio. The army authorities at once permitted the placing of the applicant in an army hospital, where he was treated by the physicians in charge up to the time of his death. The patient grew rapidly worse and he died from polio within a few days after entering the hospital.

The army immediately sent to the mother, Ethel G. Short, a telegram addressed to her home at 1386 Euclid Avenue, Berkeley, California. This telegram was dated August 30, 1950, and was delivered on August 31, 1950. It was in the form employed by the United States Army in giving notice to parents

of the death of a son, who dies when in the service. It read, as follows:

1950, Aug. 31, P.M.
San Francisco, Calif., 31, 350P.

OA522.
O.SFC853 Govt. PD-WUX.

Mrs. Ethel M. Short,
1386 Euclid Ave., Berkeley, Calif.

From AGAO-C Signed Witsell the Adjutant General the Secretary of the Army Regrets to Inform You That Your Son Irving R. Short Died 30 August in Tokyo Japan PD He Was Hospitalized in Tokyo on 26 August Seriously Ill With Poliomyelitis PD My Sympathy Is With You in Your Bereavement.

THE ADJUTANT GENERAL,
Washington D. C., 3120572.

The son, Harvey Short, requested that the body of the applicant should be shipped home to Berkeley, California. Thereupon the officials of the Department of the Army who attended to such matters raised the question as to whether they could have anything to do with shipping the body and whether the shipping of the body could be at government expense. It was determined that the shipping could not be a governmental expense and the matter of arranging for the payment of this expense was referred to the State Department. Thereupon the State Department wrote to the mother, Ethel Short, what was called a speed letter, which stated that

since the sending of the telegram of August 30, 1950, hereinbefore mentioned, the army had definitely established that the decedent, Irving R. Short, was not a member of the armed forces at the time of his death and that as a result, the matter of preparing and shipping Irving Short's body had been referred to the State Department and that as American Consular offices did not have funds for the preparation and disposition of remains of private American citizens, Mrs. Short would have to provide the expense of preparation and shipment of her son to the United States for interment and that she should send a draft in the sum of $400.00, payable to the Secretary of State, to meet expenses and should give the name and address of the undertaker who would receive the body. The following is a copy of said speed letter:

Department of State
Washington 25, D. C.
Speedletter

Sept. 20, 1950.

Date September 20, 1950.

Speedletter to:
Mrs. Ethel Short,
1386 Euclid Avenue,
Berkeley, California.

Reference is made to the telegram sent to you by the Department of the Army on August 31, 1950,

informing you of the death of your son Irving R. Short on August 30, 1950, in Tokio, Japan. The Department of the Army has made a thorough investigation of its records, both in the United States and Japan, and it has been definitely established that Mr. Short was not a member of the Armed Forces at the time of his death, and as a result the matter has been referred to this Dept. for final disposition of the remains.

You will understand of course that American consular officers do not have the funds for the preparation and disposition of the remains of private American citizens who die within their consular jurisdiction. Therefore it will be necessary for you to make a deposit with the Dept. to cover any expenses incurred in connection with the preparation and eventual disposition of the remains. If it is your desire to have your son's body returned to the U. S. for interment, it is suggested that you forward to this Dept. a certified check, bank draft or postal money order for $500, payable to the Secretary of State of the U. S. It will be necessary also for you to furnish also the name and address of the undertaker to whom the remains are to be consigned. On the other hand if it is your desire that the remains are to be interred locally, the Department will request the appropriate American conselor officer in Japan to obtain estimate of such costs for submission to you. Any unexpended balance of your deposit will be returned to you; however if the ex-

penses exceed the amount of your deposit, an additional deposit will be required.

The Dept. will appreciate a prompt attention to this matter.

Sincerely yours,

For the Secretary of State:

FRANCIS E. FLAHERTY,
Assistant Chief, Division of
Protective Services.

By air-mail letter dated September 23, 1950, said Ethel G. Short sent the $400.00 in compliance with the aforesaid speed letter. This air-mail letter instructed that the undertaker who would receive the body would be Albert M. Brown & Co., an Oakland undertaker. The State Department thereupon shipped the remains of Irving R. Short to the Presidio in San Francisco, California. The body was shipped aboard the United States ship, the General Gaffey. It was buried in Berkeley by the Oakland undertaker, Albert M. Brown & Co., the funeral services being held in Berkeley, California.

Item 9:

About September 15, 1950, said Ethel Grace Short ascertained that her son, Irving Ritchie Short, had procured the insurance policy hereinbefore mentioned. However, she was unable to find the policy itself. On or about the date last mentioned, she phoned to the District Office of the Veterans Administration, in Oakland, California, about the pol-

icy and she was advised to call at said office and bring the telegram dated August 30, 1950, which is hereinbefore mentioned and which in the Complaint is referred to as a radiogram. She was advised that if the policy was lost, that would not affect the claim. A relative of Mrs. Short then called at the said office and was provided with a form of an insurance claim under said policy. This claim was filled out by Mrs. Short and, together with said telegram, was left at the Oakland office on or about September 25, 1950. Said Oakland office had the number of the insurance policy referred to.

Item 10:

On or about October 18, 1950, Mrs. Short received from said District Office a post card stating that the files regarding said claim had been forwarded to the Central Office of the Veterans Administration in Washington, D. C.

Said files included the original of said telegram.

Item 11:

Near the end of October, 1950, Mrs. Short employed Clark & Morton, attorneys at law, having offices in Berkeley, California, to aid her in attending to her claim upon the policy.

Item 12:

Under date of November 1, 1950, said attorneys, acting for Mrs. Short, wrote the Veterans Administration in Washington, D. C., stating that, according to the post card received by Mrs. Short, the

records relating to her claim had been sent to the Central Office of the Veterans Administration in Washington.

This letter also explained that at the outbreak of the Korean War, the insured, Irving Ritchie Short, had gone from Formosa to Tokio to again enter into the service of the United States Army and that on taking his medical examination, he was found to be afflicted with polio and was placed in the United States Army Hospital in Tokio, Japan, for treatment, where he died within a few days.

This letter from the attorneys stated that Mrs. Short was not well and it requested that her claim should be given special attention.

At this time Mrs. Short did not know that the policy of insurance had been changed or supplemented so as to specify as beneficiaries the contingent beenficiaries hereinbefore mentioned, Item 3.

Item 13:

The Veterans Administration, in reply to the letter from the attorneys last mentioned, sent a letter dated November 17, 1950. This letter was sent to Mrs. Short and called attention to the fact that the claim which she submitted had not been signed. The letter stated, in substance, that Mrs. Short should sign a claim on what is known as Form 8-355-C, a copy of which was enclosed, and that on Form 8-150-a, copy of which was enclosed, she should indicate the type of settlement which she elected to have upon such claim.

Item 14:

These forms were promptly filled out by Mrs. Short and signed by her and they were forwarded to the Veterans Administration, Washington, D. C., Attention of R. J. Hinton, Director, Dependents and Beneficiaries Claims Service, with a letter from Mrs. Short's attorneys dated November 24, 1950.

Neither Mrs. Short nor her attorneys were advised of any objection to the form of contents of the claim last mentioned.

Item 15:

The statement signed by Mrs. Short as to the payments which she desired to have made to her under the policy declared that she desired that these payments should be made in 36 equal monthly installments, but that payment should be made as much more rapidly as was permissible.

Item 16:

Mrs. Short found the insurance policy hereinbefore referred to and on October 9, 1950, it was promptly mailed to the Veterans Administration, Washington, D. C., with an air mail letter sent by Mrs. Short's attorneys.

Item 17:

Mrs. Short wrote a letter dated October 5, 1950, to the Adjutant General of the United States Army, wherein she claimed that the expense of shipping home the remains of her son, Irving Ritchie Short, should not have been inflicted upon her; that she

understood that he had gone from Formosa to Tokio under an order issued by the War Department. She urged that he was in or was virtually in the service before he died.

Under date of December 6, 1950, Edward F. Witsell, Major General, U. S. A., then Adjutant General, wrote Mrs. Short in response to the letter last mentioned, stating that Irving Short had not reentered the United States Army at the time of his death and that there was no authority for the Department of the Army to reimburse Mrs. Short for expenses incurred incident to his death. This letter concluded with the following statement:

"Your son's remains are being returned to the United States aboard the U. S. N. S. General Gaffey, which departed from Yokohama, Japan, on December 2, 1950, and is scheduled to arrive at the San Francisco Port of Embarkation, Fort Mason, California, on or about 12th December, 1950. His remains were shipped on space available basis which will relieve you of paying the cost of ocean transportation."

Item 18:

Under date of December 22, 1950, the Veterans Administration, in response to an inquiry from the attorneys for Mrs. Short relative to her claims, sent a letter to said attorneys, which was upon a printed form and which contained the following:

"This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

The following printed sentence was also checked:

"You will be further advised at the earliest possible date."

Item 19:

On January 18th, 1951, the attorneys for Mrs. Short wrote the Veterans Administration saying that Mrs. Short had heard nothing further in regard to the claim.

On February 21st, 1951, the attorneys for Mrs. Short sent to the Veterans Administration a similar letter.

Under date of March 5th, 1951, the Veterans Administration sent to said attorneys a form letter acknowledging the receipt of the two preceding letters and inviting attention to the printed language marked with crosses. This language was, in substance, the same as that hereinbefore mentioned in the prior form letters. This form letter last mentioned contained also the following:

"Action on this claim is pending receipt of an official report of death from the Service Department."

Item 20:

Under date of March 31, 1951, the attorneys for Mrs. Short mailed a letter to the Veterans Administration containing the following:

"Your letter dated March 5, 1951, which was in response to our letter of Feb. 18, 1951, certainly does

not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

> " '6. Action on this claim is pending receipt of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?"

Item 21:

Mrs. Short herself mailed a letter to the Veterans Administration dated April 1, 1951, and she received a reply to this letter dated April 24, 1951, reading as follows:

April 24, 1951.

Mrs. Ethel G. Short,
1386 Euclid Avenue,
Berkeley 8, California.

Dear Mrs. Short:

Reference is made to your letter of April 1, 1951, enclosing letter dated October 26, 1950, from Col. Washington M. Ives, Jr., Executive, General Headquarters, Far East Command, and letter dated September 11, 1950, from the Chinese Embassy, Washington, D. C.

Before settlement of the $10,000 National Service Life Insurance may be made to you as beneficiary of the above-named veteran, it is necessary under Veterans' Administration regulation that there be

of record proof of death of the above-named veteran. This office is endeavoring to obtain an official report of death from the Service Department, however, it seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.

Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised.

Returned herewith are the letters you enclosed as requested.

Very truly yours,

R. J. HINTON,

Director, Dependents and Beneficiaries Claims Service.

Item 22:

In a letter dated May 15, 1951, mailed to the Veterans' Administration, the attorneys for Mrs. Short stated:

"We are writing you again on behalf of Mrs. Ethel G. Short."

This letter explained that the attorneys had been endeavoring to help Mrs. Short obtain action upon her claim. This letter contained the following:

"Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert M. Brown & Co. We can supply you with proof of the burial."

This letter last referred to, dated May 15, 1951, also contained the following:

"In fairness to Mrs. Short, it appears that action on this claim is bogged down by a purely technical question of procedure and, as we construe your letter, a decision must first be reached as to whether Irving Short was in the military service, and then apparently the question of some type of follow-up proof as to death must originate out of the War Department, but if it is determined that Irving R. Short was not in the military service, then the proof of death must be supplied by the State Department. Of course, so far as this death claim is concerned, the material fact is that Irving Short is dead."

Item 23:

With the said letter, dated May 15, 1951, the attorneys for Mrs. Short mailed to the Veterans' Administration a Certificate executed by the physician of the Army Hospital, where Irving Short died. The form for this certificate had been procured by Mrs. Short from the Prudential Insurance Com-

pany of America, as it was thought that the company last mentioned would require a physician's certificate as a part of the proofs of death upon a policy which the decedent was carrying in said company in favor of his mother. Said company, however, accepted a copy of the telegram of August 30, 1950, as proof of death. A copy of this Certificate is as follows:

Proofs of Death—Physician's Statement
to Be Obtained by Claimant

The Prudential Insurance Company of America

Full Name of Insured: Short, Irving R.

Home Address: 1386 Euclid Avenue, Berkeley, California.

Immediate Cause of Death: Poliomyelitis, anterior, acute, paralysis of arms, spinal, legs, abdomen and neck.

Duration: 26 August, '50, to 30 August, '50.

Date of Death: August 30, 1950.

Date of Birth or Age Attained at Death: 28.

Place of Death (If Hospital or Institution, Give Name): 361st Station Hospital, APO 1055.

Date of First Treatment for Last Illness: 26 August, '50.

Date of Last Treatment: 30 August, '50.

I hereby Certify that the Information in this

statement is Complete and True to the best of my knowledge and belief.

Signature:

ROBERT S. CHESTNUT, M.D.,
(Or Robert S. Chestreet),
(Illegible Signature),
361st Station Hospital, APO 1055, c/o PM, San Francisco, California.

This physician's certificate was not executed under oath as required by 38 C.F.R. 3.30. (Code of Federal Regulations.)

Neither Mrs. Short or her attorneys were advised of any objection to the form of said certificate. They did not supply to the Veterans Administration information in support of the claim of Mrs. Short other than as shown by this stipulation or the admissions of the pleadings.

Item 24:

On June 18, 1951, said Veterans Administration sent to the attorneys for Mrs. Short a letter, which letter recited that a report from the Army states that Irving Ritchie Short was not in active service at the time of his death and that a report of death was not available at "that office."

The letter also contained the following:

"As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State

Department. When this evidence is on file, prompt action will be taken on the claim."

Item 25:

On June 14, 1951, Mrs. Short died, and, on June 20, 1951, the attorneys mailed a letter to the Veterans Administration advising them of that fact.

Item 26:

On July 3, 1951, the State Department sent to the Veterans Administration an official report of the death of said Irving Ritchie Short.

Item 27:

By letter, dated July 11, 1951, the Veterans Administration advised the attorneys for Mrs. Short as follows:

"As the principal beneficiary died before receiving insurance benefits, the full amount of the insurance, including the monthly payments which should have been paid to Ethel Grace Short for the period from the date of the Veteran's death to the date of her death is payable to the contingent beneficiaries in the amounts designated by the insured."

This decision of the Veterans Administration was appealed by plaintiff to the Board of Veterans Appeals, which Board, on May 2, 1952, affirmed the decision.

Item 28:

Before this suit was filed, the proceedings mentioned in Paragraph 20 of the Complaint occurred. The allegations of said paragraph and of Paragraph 21 of the Complaint are true.

Item 29:

The allegations of Paragraph 4a, as to the residences of the parties therein referred to, are true.

Dated: April 8th, 1954.

CLARK & MORTON,

By /s/ GEORGE CLARK,
GEORGE CLARK,

Attorneys for Plaintiff, Margaret D. Short, as Administratrix of Estate of Ethel Grace Short, Deceased.

/s/ FRANK V. CORNISH,

Attorney for Defendant, James Harvey Short, Individually and as Administrator.

/s/ RANDELL LARSON,
Attorney for Defendant,
Berkshire Industrial Farm.

[Endorsed]: Filed April 19, 1954.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Murphy, D. J.

This is an action contesting a Veteran Administration's ruling concerning the disposition of the proceeds of a National Service Life Insurance policy. Jurisdiction is invoked under Section 14 of the Insurance Act of 1946.[1]

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[1]All footnotes appear in Appendix.

The facts were stipulated. They need be set out only briefly. Irving Short died in Japan on August 30, 1950. He had in effect a Ten Thousand Dollar ($10,000) policy of National Service Life Insurance. His mother, Ethel Short, was the principal beneficiary. She was not entitled to a lump-sum payment of the proceeds. Harvey Short, Irving's brother, and Berkshire Industrial Farm of Canaan, New York, were equal contingent beneficiaries. On September 25, 1950, Mrs. Short filed claim with the Veterans' Administration for the proceeds of the policy. Mrs. Short died on June 14, 1951. The Veterans' Administration did not receive the report of death of the insured it required from the State Department until July 3, 1951. Mrs. Short and her attorneys had previously sent to the Veterans' Administration a telegram which she had received from the Adjutant General, Department of the Army, Washington, D. C., stating that her son, Irving, was dead. They had also sent a certificate which was accepted by the Prudential Life Insurance Company for payment on that company's policy on Irving's life.

On November 29, 1951, the Veterans' Administration, through the Dependents and Beneficiaries Claims Service, ruled that the estate of Mrs. Short, the principal beneficiary, was entitled to no part of the proceeds and that the contingent beneficiaries were each entitled to one-half. This ruling was affirmed by the Board of Veterans' Appeals. Suit was brought by the estate of Mrs. Short joining the

United States, the estate of the insured and the two contingent beneficiaries as defendants.

It is clear that had the insured died prior to August 1, 1946, the ruling of the Veterans' Administration would be correct.[2] The National Service Life Insurance Act of 1940 provided explicitly in Section 602 (i), (j) and (k) that: (a) The right of any beneficiary to payment of any installments shall be conditioned upon being alive to receive them; (b) No person shall have a vested right to payment; and (c) No installments shall be paid to the heirs or legal representatives of the insured or of any beneficiary.[3] But important and far-reaching changes applicable to insurance maturing after August 1, 1946, were made by the Insurance Act of 1946.[4]

The restrictions on the permissible classes of beneficiaries were removed.[5] Lump-sum settlements were made available to beneficiaries at the option of the insured.[6] Sections 602 (i), (j) and (k) were amended by adding after each section:

> "The provisions of this subsection shall not be applicable to insurance maturing after [August 1, 1946]."[7]

A new subsection, 602 (u), was added[8] which in turn was amended in 1949,[9] so that as that section applies to this policy it reads:

> "With respect to insurance maturing on or subsequent to August 1, 1946, in any case in which the beneficiary is entitled to a lump-sum

settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured, or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured: Provided, That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat."[10]

The Veterans' Administration, pursuant to its general rule making authority under the Act,[11] promulgated the following regulation:

> "If the principal beneficiary of National Service Life Insurance maturing on or after August 1, 1946, does not survive the insured or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in accordance with the provisions of Sec. 8.77. (Emphasis added.)[12]

This regulation specifically covers the case before me. Its effect is critical. Although the problems of the scope of review of Administrative regulations have plagued the courts; here, the Veterans' Administration ruling is made expressly reviewable.[13] There is no question of fact involved. The problem is solely one of law. Nor does the legal question require any special administrative experience or technical proficiency.

The problem of whether this regulation is legislative or interpretive, and the incident problems of my power to review its correctness, is solved by United States v. Zazove, 334 U. S. 602, 68 Sup. Ct. Rep. 1284 (1948). The Supreme Court there read a 1946 Amendment[14] designed to eliminate the finality of the decisions of the Veterans' Administration[15] as "indicative of Congressional concern that the regulations of the Veterans' Administration be subject to more than a casual judicial scrutiny when they are based upon a controverted construction of the statute."[16] Such regulations are "not automatically to be deemed valid merely because not plainly interdicted by the terms of the particular provisions construed."[17]

The Veterans' Administration regulations involved in Zazove were reviewed as if the regulations were interpretive. They more closely approached legislative regulations than the regulation involved in this case.[18]

Accordingly, I have carefully examined the statute as a whole, its historical setting and pur-

pose and its legislative history with a view toward testing the validity of the regulation. I recognize that ascertaining legislative intent[19] is not an easy problem and that "he who supposes that he can be certain of the result, is the least fitted for the attempt."[20] Nevertheless, this is a judge's function and duty. The result is important in administering National Service Life Insurance.

The statute must take meaning from its historical setting.[21] War risk insurance legislation has a long history extending continuously from the First World War to the present date. The provisions of the various Acts are set out in U. S. v. Henning, 344 U. S. 66, 71, 72 and need not be repeated here except to state that the Acts show a clear pattern of Congressional policy: Statutes enacted in war crises narrow the range of beneficiaries and put stringent limitations on the rights of estates to take. Peace-time legislation broadens both the class of permissible beneficiaries and the rights of estates to take.

The purpose of the 1946 Amendment was to place National Service Life Insurance on a peace-time basis;[22] to remove restrictions placed in the 1940 Act which drastically limited payments of insurance proceeds because of the added war-time hazards.[23] With the war-time hazards ended, the Insurance Fund was to be like that of other Mutual Companies.[24] National Service Life Insurance was to conform more readily with the provisions of commercial insurance.[25]

With this general purpose behind us—what does Section 602(u) provide?

Read with complete literalness the proceeds of the insurance go to the estate of the insured. "A designated beneficiary not entitled to a lump-sum settlement (Ethel Short) [died] before receiving all the benefits due and payable." But this reading of the statute would exclude the possibility of a contingent beneficiary taking anything after the death of the principal beneficiary. The statute does not require this result. Let us look at the legislative history of the Act. Whatever the present inviolability of the plain meaning rule[26] the statute is not so clear as to render an inquiry into the legislative history unnecessary. The three contingencies upon which the estate of the insured takes are quite reasonably read as covering situations where no beneficiary is alive to take the remaining proceeds of insurance. While the act does not specifically set out the right of contingent beneficiaries, Section 602(t)[27] speaks of payment to the "first beneficiary." This implies the possible existence of a second. The 1940 Act was construed as recognizing the right of a contingent beneficiary to take after the death of the principal beneficiary.[28] I find nothing in the 1946 Act which would indicate that this result was meant to be changed.

The legislative history of the 1949 Amendments to Section 602(u) makes it clear that the section was not intended to place the unpaid balance in the estate of the insured when there were contingent beneficiaries still living.[29]

This brings us to the question of whether the estate of the principal beneficiary is entitled to those payments which accrued[30] during her lifetime but which were not paid, as against the claims of the contingent beneficiaries. The question is whether the Act requires, as to insurance matured after August 1, 1946, that the principal beneficiary be alive in order to receive payment as against the contingent beneficiaries.

I take it as self-evident that the provisions of Section 602 (i), (j) and (k) do not require it. They are expressly inapplicable to this policy. Nor do I find any other provision in the 1940 Act which would require it. The Veterans' Administration ruling that Mrs. Short's estate could not take because "the National Service Life Insurance Act of 1940 provides that * * * the designated beneficiary has no vested rights in the proceeds until receipt thereof,"[31] is not sound if based, as it apparently is, on the 1940 Act. (Emphasis added.)

Does Section 602(u) preclude payment to Mrs. Short's estate? I think not. The legislative history of the 1946 Amendment shows clearly that Section 602(u) was designed to cover only the final disposition of insurance not paid to a designated beneficiary.[32] Under the 1940 Act if no beneficiary within the permitted class was alive to receive payment, the unpaid balance reverted to the Treasury.[33] This provision together with the limited class of permitted beneficiaries was designed to limit the

payments, increased by war-time hazards, to those who were likely to be dependent upon the insured or to whom the insured owed some moral obligation.[34] They were removed from the 1946 Act and subsection (u) substituted[35] to govern the payment of the unpaid balance of insurance which was payable in installments.[36]

Subsection 602(u) was not meant to be exclusive of all receipt of payments by estates. If it were, as to beneficiaries entitled to a lump-sum settlement, their estates could take only if such beneficiary "elected some other mode of settlement and [died] before receiving all the benefits due and payable." If a beneficiary did not so elect, and Section 602(u) were exclusive of payments to estates, no payment would be made. The other provisions of 602(u) are inapplicable. But, the clear purpose in placing 602(u) in the Act was to abrogate the result under the 1940 Act, where if no beneficiary was alive to receive payment, the insurance remained unpaid and reverted to the Treasury.[37] The Veterans' Administration regulations provide that in this situation the unpaid balance is payable to the beneficiary's heirs.[38]

The 1949 Amendments to Section 602(u) which added the words, "whether accrued or not," after the words, "remaining unpaid insurance," does not preclude the estate of the beneficiary taking as against the contingent beneficiaries.

The purpose of the Amendment was "to make it clear that as to insurance maturing on or after

August 1, 1946, in cases where the beneficiary could not have elected to receive in a lump-sum settlement, any accrued installments on such insurance not paid to such beneficiary during his lifetime shall be paid to the estate of the insured rather than "to the estate of the beneficiary."[39]

I have been unable to discover, and counsel have not cited any other portion of the 1946 Act or any legislative history which would require or infer that the principal beneficiary must be alive to take as against contingent beneficiaries.[40]

What is there to be said on the other side? The restrictions on payments to estates found in Section 602 (i), (j) and (k) of the 1940 Act were expressly removed. They were removed because they related to a system which assumed at government expense the hazards of war-time deaths and in which payments were limited to a restricted class of beneficiaries. "Such provisions would not be in conformity with the disposition of insurance, payment of which is not limited to a restricted class of beneficiaries."[41] Within the general purpose of the 1946 Act, to conform with commercial insurance as far as possible, the Congressional concern with payments to estates was removed. Installment payments remaining unpaid were specifically payable to estates.[42]

I cannot believe that Congress intended that the rights of the principal beneficiary could be defeated by an administrative failure to pay or by litigation over the proceeds extending beyond that

beneficiary's death. This idea of elementary justice is not, as is contended by both defendants, removed as it applies to the construction of this Statute by U. S. v. Henning. It is true that Henning held that under the 1940 Act a beneficiary must be alive to take, and that delay in payment, whether attributed to administrative inaction or litigation, would not change the result. But this result was wholly based on the explicit provisions of Section 602 (i), (j) and (k) and the Congressional pattern of drastically restricting the rights of beneficiaries to take in war-time. Both these reasons have disappeared. Sections (i), (j) and (k) explicitly do not apply. The war-time policy has been reversed.

It is persuasive that even under the strict language of the 1940 Act,[43] both circuits which considered the problem[44] two Justices of the Supreme Court[45] and District Judge Wysanski[46] held that the estate of the beneficiary could take these installments which accrued prior to the beneficiary's death. The three District Courts which held to the contrary did so on the basis of Section (i), (j) and (k) alone.[47] Under the 1919 Act—war-time legislation—the estate of the beneficiaries took payments which accrued prior to the beneficiaries' death.[48]

I hold that under the 1946 Act, as amended, the estate of Mrs. Short is entitled to those unpaid installments which accrued prior to her death and that the contingent beneficiaries share the balance equally.

The facts stipulated between the parties and this memorandum opinion will constitute the findings of fact and conclusions of law required under Rule 52(a). Let a draft of a judgment embodying this decision be submitted in accordance with the local rule.

Dated: August 10th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge.

Appendix

[1]60 Stat. 788, 789 (1946); 38 U.S.C. 817.

[2]U. S. v. Henning, 344 U. S. 66 (1952); Baumet v. U. S., 344 U. S. 82 (1952).

[3]54 Stat. 1010 (1940); 38 U.S.C. 802 (i), (j) and (k).

[4]Pub. L. No. 589, 79th Cong., 2d Sess. (August 1, 1946); 60 Stat. 781, et seq. (1946).

[5]Id. at Sec. 4; 60 Stat. 782 (1946).

[6]Id. at Sec. 9; 60 Stat. 785, 786 (1946).

[7]Id. at Sec. 5(b); 60 Stat. 783 (1946).

[8]Id. at Sec. 9; 60 Stat. 786 (1946).

[9]Pub. L. No. 69, 81st Cong., 1st Sess. (May 23, 1949); 63 Stat. 74, 75 (1949).

[10]38 U.S.C. 802(u).

[11]38 U.S.C. 808, 60 Stat. 788 (1946).

[12]Sect. 10:3941, V. A. Regulations, 13 Fed. Reg. 2584, May 19, 1948; Now, 38 Code Fed. Regs. Sec. 8.91(b).

[13]38 U.S.C. 808, 60 Stat. 788 (1946).

[14]Pub. L. No. 589, 79th Cong., 2d Sess. Sec. 12 (August 1, 1946); 60 Stat. 788 (1946).

[15]Sen. Rep. 1705, 79th Cong., 2d Sess. 9 (1946); H. R. Rep. 2202, 79th Cong. 2d Sess. 10 (1946). See U. S. v. Zazove, 334 U. S. 602, 611, 612, 168 Sup. Ct. Rep. 1284, 1288 (1948).

[16]U. S. v. Zazove, Id. at 612, 68 S. Ct. Rep. at 1288.

[17]Id. at 611, 68 Sup. Ct. Rep. at 1288.

[18]The distinction between legislative and interpretative rules is not always clear. Here the V. A. rule making power extend to rules "Not inconsistent with the provisions of the Act" and "necessary and appropriate to carry out its purpose." Sec. 608 of N.S.L.I. Act. of 1940; 54 Stat. 1012, 1013 (1940); 60 Stat. 788 (1946); 38 U.S.C. 808. The validity of regulations promulgated under this section depend in large part on whether they properly interpret the Act.

[19]A Judge's function in looking for "legislative intent" or indeed if it is ever ascertainable is subject to much controversy. Compare: Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930) with Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930). See Sparkman, Legislative History and Interpretation of Laws, 2 Ala. L. Rev. 189 (1950). It is at least a short way of describing one process of interpreting Statutes. I use the words in that sense.

[20]Judge Learned Hand in U. S. v. Klinger, 199 F. 2d 645, 648 (2d Cir., 1952). See U. S. v. Henning 344 U. S. 66, 79 (1952), dissenting opinion.

[21]U. S. v. Henning, 344 U. S. 66 (1952); U. S. v. Zazove, 334 U. S. 602 (1948).

[22]Statement of Congressman Rankin, sponsor of the bill and chairman of House Committee on World War Veterans' Affairs, in reporting the bill on the floor. 92 Cong. Rec. 6169 (1946).

[23]Mr. Rankin told the House that "Several years ago there was a bright scheme concocted to bypass the Veterans' Committee, and at the other end of the Capital an insurance bill was placed as a rider on a tax bill, * * * the Committee * * * could not touch it. As a result they emasculated the insurance law so badly that it became necessary for us to bring out this bill to correct injustice," 92 Cong. Rec. 6169 (1946). The legislative history of the 1940 Act is very sketchy. See H. R. Rep. No. 2894, S. Rep. No. 2114, H. R. Rep. No. 3002, 76th Cong. 3rd Sess. (1940). The testimony of Mr. Harold Breining, Assistant Administrator for Insurance, Veterans' Administration, Hearings before the Subcommittee on Insurance of the Committee on World War Veterans' Legislation, House of Representatives, 79th Cong. 2d Sess. on H. R. 5772 and H. R. 5773 (p. 73) sets out the reasons for the 1940 restrictions.

[24]Testimony of Mr. Breining, Hearings, supra, Note 23 (pp. 73, 74, 78); Testimony of General Omar Bradley. Veterans' Administrator, Hearings, supra, Note 23 (p. 6).

[25]Testimony of General Bradley, Hearings, supra, Note 23 (p. 6). Rep. Cunningham, member of the Committee on World War Veterans' legislation,

stated on the floor of the House that the bill "will give to the veterans the same kind of insurance, approximately, that he would buy in a commercial policy from any old line company." 96 Cong. Rec. 6171 (1946). See exchange between Congressman Allen and Mr. Breining, Hearings, supra, Note 25 (p. 73).

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[26]Compare Consolidated Flower Shipments, Inc., v. C.A.B., 205 F. 2d 449 (9th Cir., 1953) with American Fire & Casualty Co. v. Finn, 341 U. S. 6, 10 (1951); Markham v. Cabell, 326 U. S. 404, 409 (1945); U. S. v. Dickenson, 310 U. S. 554, 562 (1940). See Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 Wash. U.L.Q. 2, 17-18 (1939).

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[27]60 Stat. 785, 786 (1946); 38 U.S.C. 802(t).

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[28]Washburn v. U. S., 63 F. Supp. 224 (W. D. Mo., 1945).

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[29]The Executive Assistant Administrator for Veterans' Affairs, G. W. Clark, sent the proposed amendment as it was passed to Senator Vandenburg, President pro tem of the Senate, recommending passage. In this letter he set out the V. A. regulations construing the unamended act [but not the regulation critical in this case] stating that he believed the regulation correctly interpreted the law but asked for the amendment to clarify the situation. Those regulations read the word "beneficiary" in Section 602(u) as "including a contingent beneficiary" so that the estate of the insured would take

(1) "if the designated beneficiary (including a contingent beneficiary) does not survive the insured;

(2) "if the designated beneficiary (including a contingent beneficiary) not entitled to a lump-sum settlement survives the insured and dies before payment has commenced;

(3) "if the designated beneficiary (including a contingent beneficiary) not entitled to a lump-sum settlement survives the insured and dies after payment has commenced but before receiving all the benefits due and payable."

The estate would take under the regulation only when no beneficiaries were alive to receive payment.

This letter was reprinted in Sen. Rep. 50, 81st Cong., 1st Sess. (1949), and H. R. Rep. 273, 81st Cong. 1st Sess. (1949).

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[30]The 1949 Amendment inserting the words, "whether accrued or not," recognizes that the payments accrue before actual payment. The Veterans' Administration Regulations recognize that they accrue. 38 C. F. Reg. Sec. 8.88.

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[31]Letter, Director, Dependents and Beneficiaries Claim Service, Nov. 29, 1951.

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[32]The bill as passed by the House, H. R. 6371, 79th Cong., 2d Sess. (1946), was introduced by Mr. Rankin after extensive hearings. The Veterans' Administration sponsored a bill (H. R. 4965) which provided in Section 5: "* * * As to hereafter matured insurance, if no person is designated as beneficiary by the insured, the insurance shall be paid in one sum to the estate of the insured; and if the last surviving beneficiary dies prior to receiving all the insurance payable, the commuted value of any unpaid installment certain remaining unpaid shall be paid in one lump-sum to the estate of such beneficiary. * * *" (Emphasis added.)

In the V. A. summary of the bill this Section was headed, "Disposition of insurance not payable or paid to a designated beneficiary," Hearings, supra, Note 23 (p. 8). This section clearly only provided for the disposition of the insurance after there was no beneficiary alive to receive them.

The American Legion, the Veterans of Foreign Wars and the Disabled American Veterans rewrote their previously introduced bills with the V. A. bill in mind. That rewritten bill (H. R. 5772) contained Section 602(u) as it was enacted in Mr. Rankin's bill (H. R. 6371). The V.F.W. representative testified before the Committee that this Section was only "a rewrite" of Section 5 of the V. A. bill. Hearings, supra, Note 23 (p. 123). However, one substantive change was made. Under the V. A. bill "if the last surviving beneficiary dies prior to receiving all the insurance payable" the unpaid balance was payable to the estate of the beneficiary. Under H. R. 5772 and H. R. 6371 if the beneficiary was "entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable" the remainder was payable to the estate of the beneficiary. If, however, "a designated beneficiary not entitled to choose a lump-sum settlement survives the insured and dies before receiving all the benefits due and payable" the remaining insurance goes to the estate of the insured.

This change, which sent the remaining unpaid insurance to the estate of the insured rather than to the estate of the beneficiary where the beneficiary was not entitled to a lump-sum settlement, related only to the unpaid balance. The written summary accompanying H. R. 5772 stated that this section "Provides for payment of unpaid balance of insurance proceeds to estate of the insured generally. Payment to a beneficiary's estate will only be made if a beneficiary dies when receiving installment payments elected in lieu of a lump-sum settlement." Hearings, supra, Note 23 (p. 164). Mrs. Rogers, ranking minority member of the Committee echoed these words in the House debates, 92 Cong. Rec. 6171 (1946). The section was meant to cover the disposition of the unpaid balance in contrast to their disposition under the 1940 Act where the unpaid balance reverted to the Treasury. Representa-

tive Rankin, in reporting the bill said: "* * * that the remainder of any insurance not paid to the beneficiary shall be paid to the estate of the insured, except that if the beneficiary could have claimed a lump-sum payment but chose to be paid in installments the amount remaining after the beneficiary's death will be paid to the estate of the beneficiary. Under existing law if there is no person within the permitted class of beneficiaries above specified living to receive payment of insurance no payments are made." 92 Cong. Rec. 6170 (1946).

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[33]U. S. v. Henning, 344 U. S. 66 (1952). Mr. Rankin so informed the House. 92 Cong. Rec. 6170 (1946).

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[34]See Note 23, supra.

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[35]The amendments to Section 602 (i), (j) and (k) making them inapplicable to insurance maturing after August 1, 1946, were contained in Section 602(u) when the Act passed the House. 96 Cong. Rec. 6168, 6174 (1946). The Senate Committee made them two separate sections. Id. at 9209, 9210, 9211. The House acceded without conference. Id. at 9568, 9569. Mr. Rankin stated that the Senate made only five changes not material here, Id. at 9668.

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[36]Section 602(u) relates only to insurance payable in installments, except where the beneficiaries do not survive the insured. The two contingencies under which the estate of the insured take involve a beneficiary not entitled to receive a lump-sum. The contingency upon which the estate of the beneficiary takes requires the right to receive a lump-sum but an election "of some other mode of settlement." These "other modes" are all installment payments. 38 U.S.C. 802(t).

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[37]See note 32, supra, particularly Mr. Rankin's statement at 92 Cong. Rec. 6170 (1946).

[38]38 Code Fed. Reg., Sec. 8.90.

[39]Sen. Rep. 50, H. R. Rep. 513, 81st Cong. 1st Sess. (1949).

[40]The statement of Mrs. Rogers in debate referred to in Note 32, supra, if taken out of context would support this view. In context, however, it refers only to that instance where the unpaid balance would go to the estate of the beneficiary rather than the insured's estate. Counsel for defendant do not cite this for their position, and I think advisedly so.

[41]Sen. Rep. 1705, 79th Cong., 2d Sess. (1946).

[42]See Note 36, supra.

[43]These provisions were characterized by the Supreme Court as an "unmistakable legislative purpose, expressed in so clear a congressional command." U. S. v. Henning, 344 U. S. 66, 76 (1952).

[44]U. S. v. Henning, 191 F. 2d 588 (1st Cir., 1951); Baumet v. U. S., 177 F. 2d 806 (2nd Cir., 1949).

[45]Mr. Justice Jackson and Mr. Justice Frankfurter dissenting in U. S. v. Henning, 344 U. S. 66 at 79 (1952).

[46]Henning v. U. S., 93 F. Supp. 380 (D. Mass., 1950).

[47]Washburn v. U. S., 63 F. Supp. 224 (W. D. Mo., 1945); Baumet v. U. S., 81 F. Supp. 1012 (S.D.N.Y., 1948); Carpenter v. U. S., 72 F. Supp. 510 (W. D. Pa., 1947).

[48]Cassarello v. U. S., 271 F. 486 (M. D. Pa., 1919).

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Plaintiff above named, and to George Clark, Esq., American Trust Company Building, Berkeley 4, California, her attorney; to Defendant James Harvey Short and Frank V. Cornish, Esq., 409 American Trust Company Building, Berkeley 4, California, his attorney; to Defendant Berkshire Industrial Farm of Canaan, New York, and Randell Larson, Esq., Severson, McCallum & Davis, 38 Sansome Street, San Francisco 4, California, its attorney:

You and Each of You will please take notice that on Tuesday, September 28, 1954, at 11:00 a.m., or as soon thereafter as counsel can be heard, defendant United States of America will move the above-entitled Court before the Honorable Edward P. Murphy, United States District Judge, Post Office Building, Seventh and Mission Streets, San Francisco, California, for a new trial.

Said Motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and will be based on this Notice, the Motion, the Memorandum of Points and Authorities attached to the Motion, and upon all the pleadings, records, and files in this action.

Dated: September 24, 1954.

LLOYD H. BURKE,
United States Attorney;

/s/ RICHARD C. NELSON,

By: RICHARD C. NELSON,
Assistant United States Attorney.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant United States of America moves for a new trial on all of the issues on the grounds:

1. That the trial was unfair to Movant because:

A. The issue of the reviewability of Veterans Administration Regulation 38 C.F.R. 8.91(b) was not raised by the pleadings, was not argued at the trial, and was not briefed by any party to the case.

B. The issue of the validity of Veterans Administration Regulation 38 C.F.R. 8.91(b) was not argued at the trial, or briefed as an issue by any party to the case.

C. That the Stipulation of Facts, adopted in part by the Court as Findings of Fact, was not signed by the Movant.

D. That the said Stipulation was incomplete in that it failed to show to the Court that Veterans

Administration Form 9-336 (executed by the insured on August 25, 1949) contained information indicating disposition of the insurance would be made under Regulations then existing (8.91 C.F.R.).

2. That the judgment directed by the Memorandum Opinion is contrary to law because:

A. The test of the validity of Veterans Administration Regulation 38 C.F.R. 8.91(b) which was applied by the court was incorrect.

B. Under 38 U.S.C. 802(u) a designated beneficiary can acquire no vested interest unless entitled to a lump sum payment.

C. It awards a portion of the insurance to an unnamed beneficiary (the Estate of Mrs. Short) in preference to named beneficiaries contrary to 38 U.S.C. 802(g).

Dated: September 24, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant United States Attorney.

Memorandum of Points and Authorities

1. Specifications of unfairness, A, B, and C appear from the record and need no citation of authority.

D. Attached hereto is a photostatic copy of V.A.

Form 9-336 executed by the insured on August 25, 1949. Footnote 1 refers to contingent beneficiaries and the situations in which they will take the insurance. The statute made no reference to contingent beneficiaries until 1951. The Regulations, (e.g. 8.91 and 8.77) provided for contingent beneficiaries on and prior to August 25, 1949.

It is clear, therefore, that the insured knew of the Regulations and intended to have the proceeds of his insurance handled as provided therein.

2. A. The test as to validity of a regulation promulgated by a government agency pursuant to congressional authority is not whether another construction is possible, but whether the interpretation by the agency is consistent (i.e. not inconsistent) with the basic act.

See Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 92 L. Ed. 10, 15, where the Supreme Court stated in the above regard:

> "* * * Congress could hardly define the multitudinous details appropriate for the business of crop insurance when the Government entered it. Inevitably 'the terms and conditions' upon which valid governmental insurance can be had must be defined by the agency acting for the Government. And so Congress has legislated in this instance, as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for

carrying out its policy. * * * Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. * * *"

"Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. * * * Indeed, not only do the Wheat Regulations limit the liability of the Government as if they had been enacted by Congress directly, but, they were in fact incorporated by reference in the application, as specifically required by the Regulations."

In the instant case the district court apparently asumed that the regulation could be held invalid if the conclusion reached by the court on the merits was not precluded by the statute, whereas in fact the regulation must be upheld unless the statute requires the conclusion reached by the court;

B. The Administrator is authorized by Section 608 of the Act, (38 U.S.C.A. (808)) "* * * to make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. * * *" But the authority of the Administrator goes further than to merely

authorize implementing regulations, for Section 602(o) of the Act (38 U.S.C.A. 802(o)), provides as follows:

> "The Administrator shall promptly determine and publish the terms and conditions of such insurance. Pending the promulgation of the terms and conditions of the five-year level premium term policy and the printing of such policy, the Administrator may issue a certificate in lieu thereof as evidence that insurance has been granted and the rights and liabilities of the applicant and of the United States shall be those specified by the terms and conditions of the policy when published." (Emphasis added.)

Paragraph 14 of the five-year level premium term plan policy reads as follows:

> "This insurance is subject to and granted under the provisions of the National Service Life Insurance Act of 1940 and amendments or supplements thereto, and regulations promulgated pursuant thereto, and is subject to the provisions of this policy."

Valid regulations, of course, have the force and effect of law, and are binding upon all concerned, including the courts. See Wilbur National Bank of Oneonta v. United States, 294 U.S. 120, 79 L. Ed. 798; Candell v. United States, 189 F.2d 442 (CCA 10); Horton v. United States, 207 F.2d 91; Walker v. United States, 197 F.2d 226 (CCA 5); Jones v. United States, 189 F.2d 601 (CCA 8); Karas v.

United States, 118 F. Supp. 446 (MD Pa.), affirmed June 30, 1954, ... F.2d ..... In the Horton case the court states, at page 93:

> "The statute vests in the Administrator of Veterans Affairs, authority to issue regulations giving waiver and discontinuance of waiver of premiums on National Service Life Insurance policies. Unless inconsistent with the law, such regulations have the force and effect of law and are provisions of the insurance contract between the Veterans Administration and the veteran. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10, 175 A.L.R. 1075; Jones v. United States, 8 Cir., 189 F.2d 601."

In the Karas case the District Court stated, at page 449:

> "The terms of the contract and the rights and liabilities of the parties under it are fixed by the Act, and the authorized administrative regulations promulgated in conformity with the Act. See Lynch v. United States, 292 U.S. 571 at page 577, 54 S. Ct. 840, 78 L. Ed. 1434; White v. United States, 270 U.S. 175 at page 180, 46 S. Ct. 274, 70 L. Ed. 530; Jones v. United States, 8 Cir., 1951, 189 F.2d 601, 602."
>
> "The regulations adopted in compliance with the Act have the full force and effect of law, Id. Magruder v. United States, D.C., 31 F.2d 332, and form a part of the insurance contract. Ross

v. United States, 5 Cir., 1931, 49 F.2d 541; United States v. Fitch, 10 Cir., 1950, 185 F.2d 471. As to the interpretation thereof, see United States v. Zazove, 334 U.S. 602 at page 610, 68 S. Ct. 1284, 92 L. Ed. 1601.

"The construction placed upon the statute by those charged with administering it is ordinarily presumed to be correct and will not be judicially otherwise construed, except for strong and compelling reasons. Washburn v. United States, D.C., 63 F. Supp. 224; United States v. Citizens Loan & Trust Co., 316 U.S. 209, 214, 62 S. Ct. 1026, 86 L. Ed. 1387."

The validity of Veterans Administration regulations promulgated with respect to special dividends was upheld in the Jones case, cited supra.

B. Aside from the question of the validity of the Veterans Administration regulation, the conclusion reached by the court is contrary to the controlling statute, Section 802(u), which makes it absolutely clear, as last amended by Public Law 69, 81st Congress, on May 23, 1949, three months prior to the time the insured executed change of beneficiary from designating his mother as principal beneficiary, that in cases where a "designated beneficiary" is "not entitled to a lump sum settlement" such beneficiary acquired no vested interest upon the death of the insured, such as would be acquired if the insured had authorized a lump sum settlement with such beneficiary. The congressional purpose to maintain

this distinction could scarcely be made more definite than was done in House Report 513 and Senate Report 50. From such Report, it appears that the Veterans Administration apprised Congress of the argument that would be made to the effect that benefits which accrued and were unpaid during the lifetime of a beneficiary should be paid to the estate of such beneficiary. Such an argument would, no doubt, be based upon the premise that the right to instalments would vest upon accrual. Such letter then pointed to the advisability of making it clear by the insertion of the words "whether accrued or not," that there would be no such vesting. The full significance of the above amendment apparently has been overlooked by the court; otherwise, the arguments with respect to the nonapplicability of subsections 602(i) and (j) to insurance maturing subsequent to August 1, 1946, would not have been carried to such length. The fact that the Veterans Administration advised the Congress of its interpretation of the Act as reflected in Regulation 3489 (38 C.F.R., 1938 Edition, 8.89), which clearly brings a contingent beneficiary within the terms "beneficiary" or "designated beneficiary" as used in 802(u), 38 U.S.C., gives meaning to the regulation covering the situation existing in this case (Section 8.91). In other words, a contingent beneficiary is definitely given the same priority as a principal designated beneficiary had over an estate; and it is made clear under what circumstances the estate of the insured and the estate of a beneficiary may take, where there has been no designation of either of such estates.

C. The conclusion of the court fails to take into consideration the fact that the insured is given the right in Section 802(g), 38 U.SC. to designate "the beneficiary or beneficiaries of the insurance," and that the only part of such subsection affected by the amendment of August 1, 1946, was the restriction upon the permitted class. The right to designate beneficiaries carries with it, necessarily, the right to stipulate the extent of the interest of each as well as to prescribe the order in which they shall be entitled to take. Since an estate may be designated as a beneficiary, the insured was free to designate an estate as a contingent beneficiary instead of naming particular persons, if he had desired to do so; and it is not carrying out the request of the insured that his mother receive the insurance to award it to her estate; rather it is awarding it to persons not contemplated by the insured.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant United States Attorney.

Dated: September 24, 1954.

Affidavit of Service by Mail attached.

CHANGE OR DESIGNATION OF BENEFICIARY
NATIONAL SERVICE LIFE INSURANCE

Please read Instructions below before filling out form. Type or use ink. Use a separate form for each POLICY on which a change or designation of beneficiary is desired.

DO NOT WRITE IN THIS SPACE

1. FIRST NAME—MIDDLE NAME—LAST NAME (Print or type)
Irving Ritchie SHORT

2. List all Policy or Certificate Nos.
FN OR N 804 17 41
FV OR V
FH OR H

3. RESIDENCE ADDRESS (Number and street or rural route, city or P. O., zone number, and State)
116 E 53rd Street, New York 22, New York

4. BRANCH OF SERVICE
Infantry

5. SERVICE SERIAL NO.
0-2 006 207

All previous designations of principal and contingent beneficiaries under National Service Life Insurance Policy No. 804 17 41 are hereby canceled and it is directed that said insurance be paid from and after my death as follows:

6 BENEFICIARY CHANGE OR DESIGNATION (*Indicate whether Principal or Contingent*)

COMPLETE NAME AND ADDRESS OF EACH BENEFICIARY (*If married woman, her own first and middle names and husband's last name must be given*)	RELATIONSHIP TO INSURED	AMOUNT OF INSURANCE TO BE PAID TO EACH BENEFICIARY (*Preferably fractions*)
Ethel Grace Short (Mrs James V. Short) 1366 Euclid Ave, Berkeley 8, Calif.	Mother (Principal)	$10,000.00
James Harvey Short, Maj. Inf. ~~% The Adjutant General, U.S.Army~~	Brother (1st Cont.)	$5,000.00
Berkshire Industrial Farm Canaan, New York	(1st Cont.)	$5,000.00

ENDORSED
Sept.
Nov.

WITNESSED BY	SIGNED AT	DATE
Jay J Cooley.	Slingerlands, N.Y.	August 25, 1949.
ADDRESS OF WITNESS Slingerland, New York	SIGNATURE OF INSURED (*Do not print*) Irving Ritchie Short	

INSTRUCTIONS

NOTE.—If change in optional settlement is desired, use VA Form 9–1616, "Change or Selection of Optional Settlement."

1. The insured may designate as principal and/or contingent beneficiary or beneficiaries any person or persons, firm, corporation, or other legal entity (including the estate of the insured) individually or as trustee. Any named beneficiary may be designated in item 6 as "Principal Beneficiary" or "Contingent Beneficiary." Any named beneficiary who is not designated as "Contingent Beneficiary" will, in general, be presumed to be a principal beneficiary. A contingent beneficiary, generally speaking, is a person who becomes principal beneficiary if the designated principal beneficiary predeceases the insured, or if the principal beneficiary, not entitled to settlement under Option 1 (lump sum), dies prior to receiving full payment of all guaranteed monthly installments. The insured will have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary or beneficiaries to cancel the beneficiary designation, or to change the beneficiary. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary will be deemed to be effective as of the date of execution: Provided, that any payment made, before proper notice of designation or change of beneficiary has been received in the Veterans Administration, will be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments. A designation of beneficiary, but not a change of beneficiary, may be made by last will and testament duly probated.
2. SIGNATURE.—Signature of insured should be in ink and witnessed by a person other than a designated beneficiary.
3. DISPOSITION OF FORM.—*When completed, this form should be forwarded immediately to the Office of the Veterans Administration having jurisdiction of policyholder's insurance records.*

VA FORM 9-336 Supersedes VA Form 336, Feb. 1945, which r

Endorsed: Filed September 24, 1954.

[Title of District Court and Cause.]

AMENDMENT OF MOTION FOR NEW TRIAL

Pursuant to agreement made in open court, defendant, United States of America, the moving party, hereby amends its Motion for New Trial by striking from same Ground 1 C.

LLOYD H. BURKE,
United States Attorney.

/s/ RICHARD C. NELSON,

By RICHARD C. NELSON,
Assistant U. S. Attorney.

September 28, 1954.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 28, 1954.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 28th day of September, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable Edward P. Murphy,
District Judge.

In this case Richard C. Nelson, Esq., Assistant United States Attorney, made a motion for a new

trial. Opposing counsel having been heard herein, It Is Ordered that said motion for new trial be, and the same is hereby, denied.

In the United States District Court for the Northern District of California, Southern Division
No. 31596

MARGARET D. SHORT, as Administratrix of the Estate of ETHEL GRACE SHORT, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, JAMES HARVEY SHORT, Individually and as Administrator of the Estate of IRVING RITCHIE SHORT, Deceased, and BERKSHIRE INDUSTRIAL FARM OF CANAAN, NEW YORK,
Defendants.

JUDGMENT

The above-entitled cause having been duly tried and submitted and the Court having filed its Memorandum of Opinion dated August 10th, 1954, wherein it provided that the facts stipulated to by the parties and said Memorandum of Opinion would constitute the Findings of Fact and Conclusions of Law in said cause, it is now Ordered, Adjudged and Decreed, in accordance with said Findings of Fact and Conclusions of Law, as follows:

That the plaintiff, Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, is entitled to and shall, subject to the provisions hereinafter stated, be paid those unpaid installments which accrued after August 30, 1950, the date of the death of the insured, Irving Ritchie Short, deceased, and prior to June 14th, 1951, the date of death of said Ethel Grace Short, on that certain National Service Life Insurance Policy set out in the Complaint herein and which is designated and numbered Certificate No. 8,041,741; and that said Administratrix shall have and recover from the United States of America the amount of such accrued installments, but subject to the condition that ten per cent (10%) of said sum shall be paid directly to Clark & Morton, attorneys for plaintiff, said amount being hereby fixed by the Court as the reasonable value of the legal services rendered the plaintiff by said attorneys in obtaining the recovery for plaintiff hereinbefore specified. That contingent beneficiaries, James Harvey Short and Berkshire Industrial Farm of Canaan, New York, a corporation, are each entitled to one-half (½) of the remaining balance due under said insurance policy; and that each of said contingent beneficiaries shall have and recover from the said United States of America one-half (½) of said remaining balance under said insurance policy.

Dated: Oct. 6th, 1954.

/s/ MICHAEL J. ROCHE,
Judge.

Approval of Form of Judgment

The above and foregoing form of Judgment is approved.

Dated: Sept. 29, 1954.

CLARK & MORTON,
Attorneys for Plaintiff.

Dated: Oct. 5, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney,
Attorneys for Defendants.

Dated: Oct. 4, 1954.

/s/ RANDELL LARSON,
Attorney for Berkshire Industrial Farm of Canaan, N. Y.

Dated: Sept. 29, 1954.

CORNISH & CORNISH,

By /s/ FRANCIS CORNISH,
Attorneys for Defendant,
James Harvey Short.

[Endorsed]: Filed and entered October 6, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiff in the above-entitled action:

Please Take Notice that the defendant United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered October 6, 1954, in favor of the plaintiff.

Dated: November 30, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Whereas, judgment was entered in the above-entitled matter on October 6, 1954; Notice of Appeal was filed on November 30, 1954, by defendant United States of America; and

Whereas, the United States Attorney, through Richard C. Nelson, Assistant United States Attor-

ney, has informed the Court that final instructions have not been received from the Department of Justice in Washington, D. C., for the perfecting of the Appeal; and the time originally allowed by Rule 73 of the Federal Rules of Civil Procedure for docketing the record on appeal has not yet expired; now, therefore,

It Is Hereby Ordered that defendant United States of America may have to and including 90 days from the date of filing the first notice of appeal within which to file the record on appeal and docket the appeal, pursuant to Rule 73 of the Federal Rules of Civil Procedure.

Dated: January 6th, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

1. The District Court erred in ruling that the estate of the deceased principal beneficiary, not entitled to lump-sum payment, was entitled to receive those insurance benefits which accrued but were not paid before the death of that beneficiary.

2. The District Court erred in failing to hold that each of the contingent beneficiaries was entitled

to one-half of the insurance benefits which accrued prior to the death of the principal beneficiary but not paid to her, as well as to their share of the benefits accruing after the death of the principal beneficiary.

3. The District Court erred in failing to follow Section 8.91(b) of the Rules and Regulations of the Veterans' Administration, 13 Fed. Reg. 7108, 7119, 38 Code Fed. Regs. 8.91(b).

4. The District Court erred in failing to give effect to the decision of the Administrator of Veterans' Affairs and of the Board of Veterans' Appeals of the Veterans' Administration though that decision was supported by substantial evidence on the whole record.

Dated: February 18, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court or true and correct copies of orders entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for appellants:

Complaint.

Answer of United States.

Answer of Berkshire Industrial Farm.

Amendment of answer of Berkshire Industrial Farm.

Answer of James Harvey Short.

Stipulation of facts and for hearing and submission of case pursuant to stipulation.

Memorandum opinion.

Notice of motion for new trial, motion for new trial, memorandum of points and authorities in support of motion together with Exhibit, and amendment to motion for new trial.

Minute order of September 28, 1955, denying motion for new trial.

Judgment.

Notice of appeal by U. S.

Notice of appeal by James Harvey Short.

Cost bond on appeal by James Harvey Short.

Order extending time for filing record on appeal and docketing appeal.

Designation by U. S. of record on appeal.

Statement of points by U. S. to be relied upon on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of February, 1955.

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14668. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, Appellee. James Harvey Short, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased, Appellant, vs. Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14,668

MARGARET D. SHORT, as Administratrix of the Estate of ETHEL GRACE SHORT, Deceased,

Appellee,

vs.

UNITED STATES OF AMERICA,

Appellant.

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The appellant, United States of America, does hereby adopt as its statement of points to be relied upon on appeal, that Statement of Points to Be Relied Upon on Appeal contained in the certified record of the United States District Court for the Northern District of California, Southern Division, which constitutes a part of this appeal record.

The appellant, United States of America, does hereby adopt as its designation of record on appeal that Designation of Record on Appeal contained in the certified record of the United States District Court for the Northern District of California, Southern Division, which constitutes a part of this appeal record.

Dated: February 28, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

[Endorsed]: Filed February 28, 1955.